APPENDIX TO PETITION FOR CERTIORARI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-171

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

BILLY J. McCOMBS, R. JAMES STILLINGS, d/b/a GASTILL COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM CORPORATION, E. I. du PONT de NEMOURS & COMPANY, BILL FORNEY, and FEDERAL ENERGY REGULATORY COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX *

* This volume contains all items required to be appended under Rule 23 of the Rules of this Court, except the opinion of the Court of Appeals and the text of Section 19(b) of the Natural Gas Act which are annexed directly to the Petition for Certiorari.

APPENDIX

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. CP74-94

UNITED GAS PIPE LINE COMPANY

v.

BILLY J. McCOMBS, R. JAMES STILLINGS d/b/a GASTILL COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM CORPORATION, LOUIS H. HARING, JR., NATIONAL EXPLORATION COMPANY, E. I. DU PONT DE NEMOURS & COMPANY and BILL FORNEY

OPINION No. 740

Before Commissioners: JOHN N. NASSIKAS, Chairman; WILLIAM L. SPRINGER and DON S. SMITH.

Opinion and Order on Natural Gas Entitlements and Remanding Proceeding

(Issued August 20, 1975)

INTRODUCTION

1. At issue in this proceeding is the scope of a producer certificate which the Commission issued in Docket No. G-2998 late in 1954 in the wake of *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, decided June 7, 1954. While we affirm presiding Administrative Law Judge William C. Levy's conclusion in his Initial Decision issued April 26, 1974, that the successor-in-interest certificate which the Commission issued in Docket No. G-12694 requires the sale and delivery in interstate commerce of all of the natural gas which is produced from the so-called Butler B lease, we conclude, in addition, that during periods when portions of the Butler B lease are unitized with other leaseholds the certificate in the latter docket requires the interstate sale

and delivery of all of the natural gas which is produced from the respective gas units and is attributable to the Butler B lease, whether the gas is produced from the Butler B lease or from other leaseholds within the gas units. Specifically, that would be 42.9658% of the natural gas which is produced from McCombs-Butler Gas Unit No. 1, 52.0767% from McCombs-Butler Gas Unit No. 2 and 14.2045% from the unnamed gas unit designated by National Exploration Company (National Exploration).

2. While Judge Levy found that all of the respondents are violating Section 7 of the Natural Gas Act, as implemented, by "making unauthorized sales of . . . gas [produced from the Butler B lease] without the approval of the Commission," we refrain from making such a finding with respect to E. I. du Pont de Nemours & Company (du Pont) since du Pont has not been found to be a "natural gas company" and is the purchaser rather than a seller in the "unauthorized sales". Additionally, we refrain from reaching a similar conclusion with respect to National Exploration to the extent that we credit the production from its gas unit which it sold under emergency procedures against the volumes which it was required to sell under the certificate in Docket No. G-12694. Furthermore, we are satisfied that the foregoing violations of Section 7 commenced in such a manner and continued under such circumstances that we should not, in the exercise of our discretion at this time, transmit evidence concerning them to the Attorney General pursuant to Section 20(a) of the Natural Gas Act for possible criminal proceedings.

3. Finally, while Judge Levy ordered the respondents to "cease and desist the sales currently being made to the intrastate market of gas produced from the Butler B lease" and to file an application for a successor-in-interest certificate under § 154.92(d) of the Commission's Regulations Under the Natural Gas Act, we take the following more-assertive actions, instead:

(A) Order the respondents, other than du Pont, who are small producers, (a) to deliver to United Gas Pipe Line Company (United) in interstate commerce in compliance with the Commission's certificate in Docket No. G-12694, (b) and from the production from their respective gas units, (c) not less than all of the natural gas which is attributable to the Butler B lease, (d) such deliveries to commence 45 days after the date hereof, or as soon thereafter as United physically connects gathering facilities to receive the gas, (e) at interim rates which are equal to the maximum rates applicable to large producers in their situation, *i.e.*, the maximum area rate under Opinion No. 595 and the maximum national rate under Opinion No. 699, on the assumption that separate sales were made to United immediately upon the completion of each well from which the production is derived.

(B) Order the respondents to file within 45 days after the date hereof, a plan or plans under which United would be made whole for its entitlements from or attributable to the Butler B lease which were delivered to others, together with their evidence upon the matters to be considered at further hearings.

(C) Remand this proceeding to an administrative law judge for further hearings to determine the amounts of United's volumetric entitlements hereunder, to consider the foregoing plan or plans and to consider a rate or rates under which United would purchase its past and future entitlements from or attributable to the Butler B lease.

Background

4. On or about May 20, 1948, B. C. Butler, Sr., *et al.*, executed an oil and gas lease to W. R. Quin (the Butler B lease) covering approximately 163 acres (the Butler B tract) situate in what was then known as South Porter Gas Field and is now known as the McCaskill Field in Karnes County, Texas. Among other matters, the lease

authorizes the unitization of the leasehold or any portion of it and provides, in this connection, that the production of gas from "any portion of any such unitized area in which all or any part of the land described herein is embraced, shall have the same effect as though a well had been commenced or completed on the land herein described or production obtained under the terms hereof. The provisions hereof shall be construed as covenants running with the land." In other words, unitization would transform the leasehold into an undivided part of a larger whole.

5. Under a Gas Purchase Contract dated April 29, 1953 (the 1953 Gas Purchase Contract), Bee Quin, individually and as independent Executrix of the Estate of W. R. Quin, agreed to sell and deliver, and United agreed to purchase and receive "merchantable natural gas . . . produced from all wells now or hereafter drilled during the [10 year] term of this contract" on three specified leaseholds, including the Butler B tract, "and Seller's proportionate part of all merchantable natural gas produced from any well or wells located on any unit or units which include any part of said lands and leaseholds. . . ." The contract was amended on August 12, 1954, to provide for the possible construction of a gasoline plant in the area; on August 31, 1954, to provide for an increase in the production tax; and on September 7, 1954, to embrace additional leaseholds and provide for the sale of oil-well gas.

6. Following the June 7, 1954, *Phillips* decision, the Commission on July 16, 1954, issued Order No. 174 which was superseded by Order No. 174-A issued August 6, 1954,[1] promulgating regulations governing the filing of rate schedules and applications for certificates of public convenience and necessity under Section 7 of the Natural Gas Act by producers and gatherers of natural gas which were also

[1] We take official notice of Order Nos. 174 and 174-A which are not part of the record.

natural gas companies. Under the regulations, independent producers of natural gas which engaged in jurisdictional activities on or since June 7, 1954, were required to file their rate schedules and applications by October 1, 1954, and independent producers which proposed to initiate jurisdictional activities after the effective date of the regulations were required to make their filings 30 to 60 days before initiating those activities.

7. On September 23, 1954, Mrs. Quin filed applications in Docket Nos. G-2997 and G-2998 pursuant to Order No. 174-A for producer certificates.[2] On December 8, 1954, the Commission issued certificates in Docket Nos. G-2997 and G-2998 authorizing the sale, and the continued sale, respectively, of natural gas in interstate commerce as more fully described in the applications and exhibits.

8. On or about April 15, 1955, Mrs. Quin assigned her individual and fiduciary interests in the properties subject to the 1953 Gas Purchase Contract, as amended, to Alfred Morrison d/b/a Consolidated Petroleum Industries; and the latter, on or about March 27, 1957, reassigned such interests to others who authorized Hawn Brothers, a partnership, to operate the properties and make appropriate filings with the Federal Power Commission. On June 3, 1957, Hawn Brothers filed an application in Docket No. G-12694 for a successor producer certificate. In 1960 Mrs. Quin's former interests were again reassigned to H. A. Pagenkopf, *et al.* On February 14, 1961, H. A. Pagenkopf, Trustee, as operator, amended Hawn Brothers' application stating, among other matters:

> "The undersigned H. A. Pagenkopf, Trustee, acknowledges to the Commission that he has taken over

[2] Our records indicate that Docket Nos. G-2997 and G-2998 were destroyed in 1964. While United furnished purported copies of the applications therein, the authenticity and admissibility of those copies are at issue.

as operator of the properties as of the closing date of the Hawn Brothers operation and hereby adopts all previous applications, filing, contracts, rate schedules, tariffs and all other related matters made on the properties by his predecessor."

The Commission, by order issued June 19, 1963, terminated the certificates in Docket Nos. G-2997 and G-2998 and issued a certificate in Docket No. G-12694 authorizing H. A. Pagenkopf, Trustee, to continue the service which had been initiated by Bee Quin pursuant to authorization in Docket Nos. G-2997 and G-2998, as more fully described in the application.

9. In the meanwhile, on February 7, 1961, H. A. Pagenkopf, *et al.*, and United amended the 1953 Gas Purchase Contract to extend its term to February 7, 1981, and to fix prices, among others, of 14¢ per Mcf for the five years ending June 19, 1974, and 16¢ per Mcf for the remaining term, in both cases subject to readjustment.

10. On or about April 5, 1966, but as of March 1, 1966, H. A. Pagenkopf, *et al.*, assigned their interests (reserving certain production payments) in certain leaseholds, including the Butler B tract, to Louis H. Haring, Jr. (Haring), *et al.*, who, in turn, engaged Bay Rock Corporation (Bay Rock) as operator. Haring testified, in this connection, that the Butler No. 7 Gas Well on the Butler B tract at that time had been completed to a depth of 2,960 feet and had last produced in January 1966; that in April 1966 Bay Rock installed a compressor which caused it to produce for 10 days; and that Bay Rock then reworked the well obtaining about 3,000,000 cubic feet of gas until it finally quit on May 28, 1966. By letter dated May 9, 1966, Haring notified United of the assignment and the designation of Bay Rock as operator, stating that his group would "make an appropriate Certificate and Rate Schedule filing with the Federal Power Commission reflecting change in ownership of said

properties." Nonetheless, his group did not make such a filing. In August 1966 Bay Rock drilled Butler No. 8 Well which produced oil at a depth of 4,200 feet and thereby kept the Butler B lease alive.

11. United wrote to Bay Rock on December 1, 1966 stating that according to its records there had been no deliveries of gas under the 1953 Gas Purchase Contract since September 16, 1966. United inquired therein as to Bay Rock's plans, if any, for the resumption of deliveries, and indicated that it would blind plate its meter station at the delivery point so that it might discontinue changing its charts pending Bay Rock's advice. Bay Rock replied on December 5, 1966, stating that the wells were depleted "and there will be no other gas available at this time." United then acknowledged Bay Rock on December 7, 1966, advising that it would remove its metering equipment for use elsewhere, but that it would reinstall such equipment whenever Bay Rock might have further gas to deliver under the contract. Bay Rock did not seek or obtain Commission authorization under Section 7(b) of the Natural Gas Act to abandon its sale to United.

12. By letter dated June 23, 1969, United notified Haring that it would reset the price under the 1953 Gas Purchase Contract at 18.3¢ per Mcf for the five years beginning June 19, 1969, but that it had not prepared an agreement for this purpose in the absence of deliveries.

13. On or about November 1, 1971, Louis H. Haring, Jr., *et al.*, assigned a 75% interest (reserving a 25% overriding royalty interest) in the west 50 acres of the 163 acre Butler B tract from a depth of 4,115 feet to a depth of 8,700 feet to National Exploration [3] pursuant to a prior agreement

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[3] As is more fully discussed in Opinion No. 678 issued December 7, 1973 (*Transcontinental Gas Pipe Line Corporation*, Docket No. CP73-4), National Exploration is an affiliate of Elizabethtown Gas

under which the 50 acre interest was unitized by National Exploration with its interest in 302 adjoining acres, forming a 352 acre unit. On an areal basis in accordance with the 1953 Gas Purchase Contract, the 50 acre interest thereby became entitled to 14.2045% of the natural gas produced from any part of the unit, including the particular 50 acres, and the other 302 acres became entitled to 85.7955% of that gas, including the gas produced from the particular 50 acres. National Exploration was unaware at the time of the assignment of United's interest in the Butler B tract.

14. On or about October 22, 1971, Louis H. Haring, Jr., *et al.*, assigned a 72% interest (reserving a 28% overriding royalty interest) in the east 113 acres of the 163 acre Butler B tract from a depth of 6,500 feet to 8,653 feet to Billy J. McCombs.[4] On or about November 5, 1971, but effective November 1, 1971, Billy J. McCombs, Basin Petroleum Corporation and Corinthian Oil Corporation designated McCombs-Butler Gas Unit No. 1 embracing the east 113 acres of the Butler B tract and the adjoining 150 acre Butler A tract below a depth of 6,500 feet and above a depth of 8,640 feet, forming a 263 acre unit. On an areal basis, the Butler B tract thereby became entitled to 42.9658% of the

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Company (Elizabethtown). Among other policies, National Exploration sought to avoid the purchase of, and competition for, proven reserves. Instead, it sought to explore for and develop reserves which would be significant to Elizabethtown but too small to attract major producers.

[4] The so-called "McCombs Group" is not a formal business organization, but consists of persons who have an apparent common interest with that of Billy J. McCombs, at least for the purpose of this proceeding. While the record does not indicate clearly when and how all of these interests came into being, the McCombs Group includes respondents Billy J. McCombs, Basin Petroleum Corporation, David A. Onsgard, R. James Stillings d/b/a Gastill Company and the McCombs Group's operator, Bill Forney (Forney). It may now include, or may have once included, Corinthian Oil Corporation, which is not a respondent.

natural gas produced from the unit, and the Butler A tract became entitled to 57.0342%.

15. On or about April 1, 1972, Louis H. Haring, Jr., *et al.*, assigned a 70% interest (reserving a 30% overriding royalty interest) in the 163 acre Butler B tract below a depth of 8,700 feet and above a depth of 9,700 feet to Billy J. McCombs. On or about April 3, 1972, the McCombs Group (except for Forney) designated McCombs-Butler Gas Unit No. 2 embracing the 163 acre Butler B tract and the adjoining 150 acre Butler A tract below a depth of 8,700 feet and above a depth of 9,700 feet, forming a 313 acre unit. On an areal basis, the Butler B tract thereby became entitled to 52.0767% of the natural gas produced from the unit, and the Butler A tract became entitled to 47.9233%.

16. Relying upon a 1967 title opinion which failed to show United's possible interest in the Butler B lease, the McCombs Group in August and September 1971 drilled the Butler No. 1 Well in the Butler A tract which produced gas at the 8,060-8,075 and 8,318-8,328 feet depths.[5] The McCombs Group thereupon contacted United, among others, to negotiate a sale of that gas. By letter dated November 19, 1971, United inquired into the source of the McCombs Group's leases, and the parties take opposite positions as to whether the McCombs Group ignored or fully complied with that request. In any event, the negotiations extended into 1972 but did not materialize. As noted, McCombs-Butler Gas Unit No. 1 embracing the production depths of the Butler No. 1 Well was designated effective November 1, 1971, and a title opinion dated December 7, 1971, disclosed United's interest in the Butler B lease.

17. In February 1972 the McCombs Group drilled the Butler No. 2 Well in the Butler A tract which produced gas

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[5] About 14 months later in November 1972 the Butler No. 1 Well stopped producing at those depths and was recompleted to the 8,109-8,116 feet depth. It is currently shut in.

at depths embraced by McCombs-Butler Gas Unit No. 1 and at the 8,950-8,970 depths. As noted, McCombs-Butler Gas Unit No. 2 embracing the latter production depths of the Butler No. 2 Well was designated on April 3, 1972, but a title opinion dated May 31, 1972, failed to show United's possible interest in the Butler B tract. Forney testified, in this connection, that he was satisfied that United had released the 1953 Gas Purchase Contract because Haring had informed him in or about December 1971 that he, Haring, had a letter to that effect. In September 1972 the McCombs Group drilled the Butler No. 3 Well in the Butler B tract which produced gas at depths embraced by McCombs-Butler Gas Unit No. 1. Finally, in September and October 1972 the McCombs Group drilled the Butler No. 4 Well in the Butler A tract which produced gas at depths embraced by McCombs-Butler Gas Unit Nos. 1 and 2.

18. In the meanwhile, under a Gas Purchase Contract dated June 1, 1972, the McCombs Group dedicated and agreed to sell and deliver to du Pont all of its interest in its reserves underlying the Butler A and Butler B tracts, subject to unitization "so long as such action does not reduce the reserves dedicated to the performance of this Contract", and du Pont agreed to receive and purchase or pay for 85% of the McCombs Group's Delivery Capacity (a defined term), at a price equal to the higher of the "prevailing price" or $.35 per Mcf for the first four years, escalating at a rate of 1¢ per Mcf each fourth year, with a Btu adjustment. Thereafter, the McCombs Group sold and delivered gas to du Pont through Lo-Vaca Gathering Company for use in the Texas intrastate market.

19. Also, in the meanwhile, early in 1972 National Exploration drilled two gas producing wells within its allocated depths of the west 50 acres of the Butler B tract, among other wells in its unitized area, and United sought to purchase that gas in April 1972. In the course of preparing royalty division orders National Exploration learned

of United's possible interest and, in January 1973, so notified United. On January 18, 1973, United and National Exploration entered into an agreement under which the latter recognized United's 50/352 (14.2045%) claim to the gas produced from its unit, and United agreed not to intervene in Docket No. CP73-4.[8] Under a contract dated May 14, 1973, National Exploration commenced a 60-day emergency sale of natural gas to United pursuant to Order No. 418 at a price of 50¢ per Mcf, with provision for a one-year extension if a limited term certificate with pregranted abandonment could be obtained. Accordingly, from May through September 1973, National Exploration sold 2,412,459 Mcf of gas to United. Under a contract dated October 9, 1973, and commencing November 15, 1973, National Exploration began a 180 day sale of natural gas to United pursuant to Order No. 491-B at a price of 65¢ per Mcf.

20. Upon being notified by National Exploration in January 1973 of its possible interest in the Butler B gas, United undertook a title search which resulted in its notifying the McCombs Group and others on June 6, 1973, of its claim under the 1953 Gas Purchase Contract. Confronted by United's claim, the McCombs Group filed a lawsuit in the District Court of Karnes County, Texas, for a declaratory judgment that they were not contractually bound to deliver the Butler B gas to United and for other relief, and the lawsuit was removed by United to the United States District Court for the Western District of Texas. On October 9, 1973, United filed a Complaint in Docket No. CP74-94 asserting that the McCombs Group (other than Forney, who was made a respondent later), National Exploration and du Pont were failing and refusing to comply with the Commission's certificate in Docket No. G-12694, and asking that they be ordered to cease and desist from their unlawful diversions of the Butler B gas to the Texas intrastate market, that

[8] See footnote 3.

they be ordered to pay back the diverted volumes, and that they be directed to make future deliveries to United. After notice, the Commission, on November 27, 1973, set the matter to hearing and ordered the foregoing respondents to show cause (1) why they shouldn't be required to file an application for a successor certificate, (2) why they shouldn't be required to cease their intrastate sales, (3) why they shouldn't be required to repay to United volumes withheld from the interstate market and (4) why they shouldn't be held in violation of Section 7 of the Natural Gas Act.

21. By order issued December 12, 1973, the Commission denied motions to dismiss or defer action on the Complaint pending resolution of the litigation, stating (footnotes redesignated):

> "From an early date, this Commission has taken the view that there is a continuing obligation to perform 'service' imposed by the Act separate and apart from any contractual requirements.[a] This distinction between the concept of underlying 'service' to the public and the contractual means by which it is implemented is quite important to a proper understanding of primary jurisdiction. Under Section 7(b), the finding that the 'public convenience and necessity' does not permit abandonment is alone sufficient to require a continuation of service, the private contract notwithstanding.[b]

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[a] "*United Gas Pipe Line Co.*, 3 FPC 3, 9 (1942). This view has been ratified by the Supreme Court, *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960)."

[b] "Id. It should be noted here that it may not be necessary to abrogate any interpretation operating as a limitation on contract obligations since any extant obligation beyond such an interpretation of the contract is not contractual, but one imposed by the Natural Gas Act."

> Resolution of the private contract disagreement cannot by any means be said to be dispositive of the paramount issues of the public interest under Section 7. In fact, it is these same public interest considerations that make it incumbent upon this Commission to exercise its primary jurisdiction, as delegated to it by the Act, in order to secure an initial administrative judgment of whether or not service should continue pursuant to a certificate of public convenience and necessity, as issued and outstanding."

22. The hearing was held on January 10 and February 13 and 14, 1974; and, although the record consists of some 363 pages of transcript, 39 exhibits and one item of evidence by reference, it is insufficient for final disposition of this proceeding. Judge Levy issued an Initial Decision on April 26, 1974, and we have before us the briefs on exceptions and briefs opposing exceptions to that decision together with du Pont's renewal of a motion to dismiss the show cause order as to it, and United's answer to that motion.

Initial Decision

23. After reviewing the background of the proceeding and the positions of the parties, Judge Levy indicated that while States, municipalities and State commissions may file complaints under Section 13 of the Natural Gas Act, "persons" such as United may also file complaints under Section 1.6 of the Commission's Rules of Practice and Procedure. That provision was adopted, he said, pursuant to the Commission's authority under Section 16 of the Natural Gas Act to make rules to carry out the provisions of the Natural Gas Act.

24. Furthermore, he indicated, the Commission is not asserting jurisdiction to determine the contractual claims

of the parties to the gas produced from or attributable to the Butler B lease:

> "The obligation to continue service under Section 7 of the [Natural Gas] Act exists separate and apart from any contractual obligation. . . . The show cause order is bottomed on the Commission's primary jurisdiction under Section 14(a) of the Act to determine whether the service obligations imposed under Section 7 of the Act by the issuance of outstanding certificates of public convenience and necessity are being violated, and if so, what remedies are appropriate."

25. Turning to the "central issue", that is, the nature and extent of the service authorized by the certificates involved herein, Judge Levy noted that National Exploration and the McCombs Group contended that the service was limited to existing wells and that the McCombs Group contended, further, that it was also limited to the formation into which existing wells had been drilled.[7] He took the position, however, that

> "The 'service' required under the [Natural Gas] Act upon certification is not limited to the service actually being performed by the producer but extends to the service proposed, including the supply of gas dedicated to interstate use, which the producer has undertaken to perform in applying for certification and which the Commission has relied upon in evaluating whether the proposed service and gas supply meet the public convenience and necessity requirements of the Act."

26. Applying this principle, Judge Levy found that Docket Nos. G-2997 and G-2998 "covered the continuing sale to United of gas produced from the dedicated acreage including the Butler B lease." The service which Mrs. Quin agreed to perform was not limited to particular wells or reservoirs, he found, but covered the sale of all gas produced during the term of the 1953 Gas Purchase Contract, as amended, in specified acreage, including the Butler B tract. And that service was continued in the successor certificate issued in Docket No. G-12694.

[7] In their Brief on Exceptions, the McCombs Group and du Pont contend that Judge Levy's fuller statement misstates their position.

27. Judge Levy relied, in this connection, on the statement in Opinion No. 467 (*Cumberland Natural Gas Company, Inc., et al.*, Docket Nos. G-18740 *et al.*), 34 FPC 132, 136 (1965):

> "The principle is well established that dedication of reserves for sale in interstate commerce occurs at least as soon as deliveries commence, and that once such service is begun, the producer cannot terminate the service without Commission approval. *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 387-389 (1959); *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 156 (1960)."

He found that gas deliveries to United from certificated acreage, including gas from wells which had been drilled subsequent to the issuance of the original certificates, continued up to 1966, and that "existing wells were depleted by the end of 1966 and United subsequently withdrew its measuring facilities." Furthermore, he rejected an argument that abandonment should be authorized *nunc pro tunc* on the basis that the Butler B tract is now known not to have been depleted in 1966, and that the deeper reserves thereunder were dedicated to interstate commerce under the original certification.

28. Judge Levy concluded that "the service authorized and the gas supply dedicated by the certificates involved herein include any and all gas produced from the Butler B acreage" and, consequently, the unauthorized intrastate

sale of that gas violates the Natural Gas Act. Additionally, he concluded that however negligent United may have been in asserting its rights, and however innocent the respondents may have been, the respondents should be required to cease and desist from continuing their illegal sales and to file applications under Section 7 for authority to make approved sales. Finally, Judge Levy concluded that the record was inadequate for determining the volumes attributable to the Butler B lease which were diverted, "and for defining the terms and conditions, including price, of past, present, and future sales." Accordingly, he said that all questions relating to appropriate remedies would be reserved for resolution after the respondents file applications for new certificates covering sales from the Butler B tract.

29. Additionally, Judge Levy denied the McCombs Group's motion that he exclude from consideration copies of the applications in Docket Nos. G-2997 and G-2998 which United supplied in the form of appendices to its reply brief after it became apparent that the applications were no longer available in the Commission's files. He noted, in this connection, that the McCombs Group did not challenge the accuracy or authenticity of the copies.

30. Accordingly, Judge Levy ordered the respondents to file, pursuant to Section 154.92(d) of the Commission's Regulations Under the Natural Gas Act, as successors in interest to the dedicated acreage and the service authorized in Docket No. G-12694, and for such other authorization as may be necessary to comply with Section 7 of the Natural Gas Act and the regulations thereunder. He also ordered them to cease and desist their current sales of Butler B gas to the intrastate market.

EXCEPTIONS

31. The McCombs Group, together with du Pont,[8] except to certain statements (I.D., pages 5, 6, 8, 11 and 14) to the effect that Section 7(c) certificates *require* service, pointing out that such certificates merely *authorize* service and that Section 7(b), instead, prohibits the abandonment of service and, conversely, requires its continuance. They assert that "service rendered" is the measure of dedication under Section 7(b), not service *proposed* (I.D., pages 8 and 9), service *authorized* (I.D., page 8) nor service *agreed to be performed* (I.D., page 9)—and they conclude that the issue to be determined is the areal and temporal scope of the "service rendered".

32. Citing a number of cases, they exclude from the measurement of the areal scope of the "service rendered" (1) the contract, since service is not required to commence simply because there is a contract, and service must be continued although there is no contract, or the contract expires; (2) the certificate, since a certificate does not require service, and service must continue although there is no certificate, or the certificate is invalid; and (3) the lease, since leases are not "facilities subject to the jurisdiction of the Commission" within the meaning of Section 7(b). By this process of exclusion they conclude that "actual deliveries" are the proper measure of "service rendered", that the "service rendered" from the Butler B lease was from reservoirs at a depth of approximately 2,900 feet and that, "As the measure of 'service rendered' ceased in 1966, so did the application of Section 7(b)." Citing a number of cases, they assert that the purpose of Section 7(b) is to require the continuance of service once it is rendered and the public relies on it; that such purpose

[8] Louis H. Haring, Jr., adopts the McCombs Group's exceptions "except where inconsistent with the rights of this Respondent." Additionally, he lists eight specific exceptions which are cumulative in substance.

can no longer be served when the known reserves are depleted and the service is in fact discontinued;[9] and that the McCombs Group is rendering a separate and distinct service from 8,000 and 9,000 feet depths which should not be subjected to a "'silent lien'" because the public has not relied on it. Opinion No. 467 cited by Judge Levy is inapplicable, they claim, because the Commission found that the wells in question were not fully depleted, (34 FPC at page 134), and because it was not contended, as is urged here, that the gas purchase contract was void.

33. The McCombs Group, together with du Pont, also except to Judge Levy's reliance upon the 1953 Gas Purchase Contract to determine the scope of the dedication to interstate commerce (I.D., page 9), on the basis that the Commission cannot determine the validity of contracts, and the validity of that contract is in dispute.[10] And noting that Section 306 of the Federal Power Act specifically authorizes *persons* to file complaints with the Commission, they argue that the omission of that word when that provision was reenacted as Section 13 of the Natural Gas Act negates similar authorization, and further, that Section 16 of the Natural Gas Act does not give the Commission independent authority to so provide by regulation.

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[9] In *Harper Oil Company* v. *Federal Power Commission*, 284 F.2d 137 (CA 10, 1960), the court said that ". . . once an independent producer of gas has dedicated his production to interstate commerce and thereby has come under the jurisdiction of the Commission, he remains thereunder *so long as production continues* [Emphasis added]." And in *Hunt* v. *Federal Power Commission*, 306 F.2d 334 (CA 5, 1962), the court said, "Like the ancient covenant running with the land, the duty to continue to deliver and sell flows with the gas from the moment of the first delivery *down to the exhaustion of the reserve*, or until the Commission, on appropriate terms, permits cessation of service under § 7(b), 15 USCA § 717f(b) [Emphasis added]."

[10] In the light of such reliance, they urge that he erred in refusing to permit discovery and to admit evidence relevant to its validity.

34. On evidentiary matters, they assert that Judge Levy erred in refusing to admit evidence on the question of abandonment in the light of his statement that it would not be in the public interest to authorize abandonment (I.D., page 11). They also claim that he erred in admitting into evidence copies of the applications in Docket Nos. G-2997 and G-2998 which were supplied by United after they pointed out in their Initial Brief that those dockets had been destroyed and, consequently, the scope of the service which the Commission had authorized could not be determined. Contrary to Judge Levy's statement (I.D., page 14), they assert that they "most assuredly challenged the accuracy and authenticity of these copies" and that they want an opportunity for confrontation and cross-examination. Finally, they complain that the Initial Decision does not contain a statement of facts officially noticed as required by § 1.30(g) of the Commission's Rules of Practice and Procedure.

35. The McCombs Group, together with du Pont, assert that while the Initial Decision finds that United received gas under the 1953 Gas Purchase Contract, it fails to find that United received gas from the Butler B lease, as distinguished from other leases under that contract. "Indeed," they say, "the record is devoid of any evidence on this issue." Furthermore, they claim, since the applications in Docket Nos. G-2997 and G-2998 are not properly in evidence, and since the copies furnished by United did not include Exhibits C specified therein, there is no support in the record for a finding that Exhibits C were in fact the 1953 Gas Purchase Contract, as amended, and consequently there is no support for a finding that certificates cover the Butler B lease. Finally, they assert, the certificates in Docket Nos. G-2997 and G-2998 covered oil-well gas but not gas-well gas, as discussed in Section IV of their Initial Brief which "is incorporated herein by this reference."[11]

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[11] We decline to consider such incorporated material on the basis of § 1.31(b)(2) of the Commission's Rules of Practice and Proce-

Hence, they claim, United and the staff failed to prove a prima facie case, and the Initial Decision erred in failing to find that United and the staff had the burden of proof.

36. The McCombs Group, together with du Pont, claim that they were denied a fair and impartial hearing because the Commission is "so embroiled in obtaining supplies for the interstate market", particularly in the light of United's supply shortage, both of which permeate the orders and pleadings in this proceeding. "Neither United's supply problems nor the problems with the Commission has in obtaining supplies for the interstate market, have any bearing on whether the McCombs Group's gas is dedicated to interstate commerce."[12] Furthermore, they claim, United has waived its rights under the Natural Gas Act and, as discussed in Section V of their Initial Brief which is "incorporated herein by this reference",[13] is estopped and barred by laches from enforcing them.

37. The McCombs Group, together with du Pont, urge that the Commission does not have authority under the Natural Gas Act to order them to repay to United the volumes which were produced from the Butler B tract. They pointed out, in this connection that the 1953 Gas Purchase Contract provides, "Seller shall have the right to sell, utilize or dispose of any surplus natural gas which Buyer is not purchasing from time to time", and that until June 6, 1973, United had not exercised its possible right under that provision. They urge, in addition, that Haring and each member of the McCombs Group holds a small pro-

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dure which requires that briefs on exceptions be "self contained". The McCombs Group's and du Pont's brief is 31 pages, single spaced, exclusive of appendices, and is therefore longer than the 50-page double spaced briefs which the rule formerly contemplated.

[12] By this statement they appear to concede that dedication, as distinguished from contractual rights, is the central issue.

[13] See footnote 11.

ducer certificate, that § 154.110 of the Commission's Regulations Under the Natural Gas Act specifically provides that §§ 154.92, *et seq.*, shall not apply to small producer sales made under small producer certificates and, consequently, Judge Levy erred in ordering them to file an application for a successor certificate pursuant to § 154.92(d). The Commission cannot issue cease and desist orders, they contend, but must go into a Federal District Court pursuant to Section 22 to stop violations of the Natural Gas Act. Judge Levy should have ordered abandonment *nunc pro tunc*, they claim, since there is evidence that no one was aware of the deeper reserves in 1966; and any order requiring deliveries to United should provide for pregranted abandonment in the event of reversal on appeal.

38. National Exploration asserts that from the language of Mrs. Quin's applications and particularly from the fact that she filed one application for existing service and another for proposed service, and from her disclaimer of Federal Power Commission jurisdiction in the wake of *Phillips*, supra, that the Commission did not certificate all natural gas service from the Butler B lease because it is unreasonable to assume that she intended to certificate more than the existing and proposed natural gas service from existing oil wells which penetrated relatively shallow depths. It asserts, additionally, that that service was abandoned *de facto* in 1966, and that the Commission should authorize its abandonment *nunc pro tunc* since neither United nor its customers relied on it after 1966;

39. Furthermore, according to National Exploration, it was unaware of United's possible interest in the Butler B tract until after it had drilled its two wells; and when it learned of United's claim it entered into an agreement with United not to sell, deliver or use gas attributable to the Butler B lease until it was determined that United had no rights to that gas, or until August 1, 1973. Thus, by contract dated May 14, 1973, National Exploration commenced a 60-day emergency sale to United pursuant to

Order Nos. 418 and 431. On June 5, 1973, it filed an application in Docket No. CI73-857 to obtain a limited term certificate to extend its sale to United for one year. While that application was pending the Commission, on September 14, 1973, issued Order No. 491 authorizing 180-day sales, and National Exploration commenced such a sale to United and withdrew Docket No. CI73-857. By the end of January 1974, National Exploration claims, it had produced 3,042,423 Mcf of natural gas from the Butler B lease and had sold 5,942,548 Mcf [14] to United under their various contracts and the several Commission orders, thereby fulfilling any obligation it may have had. Thus, Judge Levy erred in failing to find that all of its sales of natural gas produced from the Butler B lease were made pursuant to Commission orders,[15] that it was not selling such gas in intrastate commerce [16] and that it was not violating Section 7 of the Natural Gas Act.

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[14] National Exploration uses the figure, 3,530,135 Mcf, in its brief opposing exceptions.

[15] National Exploration states that it sold gas from the McCaskill Field, additionally, to Texas Eastern Transmission Corporation and Transcontinental Gas Pipe Line Corporation pursuant to Order Nos. 418 and 431, and to Valley Gas Transmission Company pursuant to those orders and Order Nos. 491 and 491-B. Those orders provided its only vehicles for selling its gas in interstate commerce and avoiding indefinite dedications which could be terminated only by complying with Section 7(b) of the Natural Gas Act, while Docket No. CP73-4 was pending—so that it could fulfill its *raison d'etre* of selling gas in interstate commerce to its affiliate, Elizabethtown Gas Company (see footnote 3). Its sale to Elizabethtown authorized by Opinion No. 678 commenced January 11, 1974.

[16] National Exploration states that it has a 50% working interest together with Tesoro Petroleum Company (Tesoro) in certain acreage in the McCaskill Field which is not involved herein, that it purchases Tesoro's working interest gas under a long term contract and that it sells about 8,000 Mcf of that gas per day in intrastate commerce to Delhi Gas Pipe Line Corporation. Thus, it contends that it has sold none of the gas which is the subject of United's complaint in intrastate commerce.

40. While United agrees with Judge Levy's decision that it is entitled to "any and all gas produced from the Butler B acreage" (I.D., page 11),[17] it excepts to his failure to require the respondents to commence deliveries to it immediately and to make up past volumes which were delivered to others. United asserts, in this connection, that it would be contrary to the Natural Gas Act to allow National Exploration a credit for the volumes which it sold to United under emergency procedures, particularly since (1) National Exploration did not purport to discharge its possible obligation to United, and (2) National Exploration's rates exceeded those under the 1953 Gas Purchase Contract and the Commission's area rates. United also asserts, in this connection, that it "has no objection to paying any interim rate which the Commission might establish pending completion of the remanded proceedings prescribed by the Presiding Judge", and it suggests (1) the maximum applicable area rate under Opinion No. 595 of 25 cents per Mcf with tax and Btu adjustments, (2) the maximum area rate under Opinion No. 662 of 35 cents per Mcf with certain adjustments, (3) the McCombs Group's rate to du Pont of 35 cents per Mcf with tax and Btu adjustments or (4) National Exploration's rate to Elizabethtown in Opinion No. 678 of 45 cents per Mcf. And repayments should be effected, according to United, by requiring the McCombs Group to allocate all of the gas to United which it produces from McCombs-Butler Gas Unit Nos. 1 and 2—not simply the respective Butler B percentages—until the volumes which were delivered to Lo-Vaca Gathering Company for du Pont are recovered.

41. Similarly, the staff agrees with Judge Levy's decision that United is entitled to all of the gas which is pro-

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[17] Nevertheless, United asserts that Judge Levy's imprecise directive to cease and desist the intrastate sales of gas "produced from the Butler B lease" (I.D., ordering paragraph (2)) should be revised to prohibit intrastate sales of gas " 'produced from or attributable to the Butler B lease'."

duced from the Butler B lease. However, the staff takes the position that the respondents have an obligation to restore to interstate commerce the volumes which were illegally diverted and, consequently, it excepts to Judge Levy's failure to acknowledge and exercise his authority under Section 16 of the Natural Gas Act.[18] to order such restoration. It states, in this connection, that in the absence of evidence of uneconomical production, the rate should not exceed the applicable area rate of 25 cents per Mcf.

42. In opposition, the McCombs Group, together with du Pont, assert (1) that the Commission cannot order reparations from the Butler A volumes in the manner suggested by United since it cannot extend its jurisdiction over "acreage which is admittedly non-jurisdictional" and (2) that it cannot order du Pont to return the gas which it purchased since the gas is beyond the Commission's reach in the hands of a non-jurisdictional entity, namely, Lo-Vaca Gathering Company. In any event, they assert, the Commission does not have authority to enter a reparation order,[19] and the 1953 Gas Purchase Contract specifically provides that "Seller shall have the right to sell, utilize or dispose of any surplus natural gas which Buyer is not purchasing from time to time . . ." They point out that the Initial Decision, in effect, requires a temporary discontinuance of production from the Butler B lease to their detriment as well as to the detriment of United in view of the probable drainage from nearby wells—and they urge that such a decision exceeds the Commission's authority

[18] "The Commission shall have power to . . . issue . . . such orders . . . as it may find necessary or appropriate to carry out the provisions of this act."

[19] They cite *Federal Power Commission* v. *Hope Natural Co.*, 320 U.S. 591, 595, 618 (1944); ***Willmut Gas & Oil Co.* v. *United Gas Pipe Line Co.***, 12 FPC 132, 146, 399, 401-402 (1953), arguing that Section 16 of the Natural Gas Act merely augments existing authority and does not confer independent authority.

since the correlative rights of the owners of the gas in place would thereby be disturbed. However, they agree with Judge Levy that the record is inadequate for determining the terms and conditions, including price, of past, present and future sales and, consequently, they suggest that the *status quo* should be maintained while such a record is developed.

43. In opposition, National Exploration reasserts its positions that it has sold no Butler B volumes in intrastate commerce and that it would be unreasonable to order it to make further deliveries to United since it sold United more gas than it produced from its portion of the Butler B lease through January 31, 1974. If it has to sell any gas to United, National Exploration asserts, "the reasonable basis for price is the price voluntarily negotiated by United" with National Exploration in 1973.

44. In opposition, and citing *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 149 (1960), United argues that an applicant for a certificate of public convenience and necessity who accepts that certificate "voluntarily assumes an obligation to comply with such terms and conditions as the Commission may attach to the certificate, such as performance of the service covered by the application." The producer-applicant's service obligation, United continues, is "defined by the producer's undertaking in support of its application" which, in this case, is embodied in the 1953 Gas Purchase Contract and which, in turn, dedicated to United all merchantable natural gas underlying or attributable to the respective leases, including the Butler B lease. Dedication is not restricted to the reservoir from which natural gas is being drawn at the time of dedication, United urges, but covers all of the acreage described in the contract, "both proven and unproven".

Pioneer Gathering System, Inc., et al., Docket Nos. G-11548 *et al.*, 23 FPC 260, 263 (1960).[20]

45. United urges that the service which Mrs. Quin offered for certification in Docket No. G-2998 was the sale of gas "pursuant to" the 1953 Gas Purchase Contract and, therefore, included all gas deliverable to United under that contract. And the sources of the gas which she offered therein were the "acreage owned and controlled by applicant", including the Butler B lease. When those sources were dedicated to interstate commerce by the issuance of a certificate and the commencement of deliveries, United continues, " 'there can be no withdrawal of that supply from continued interstate movement without Commission approval.' " *Atlantic Refining Co., et al.* v. *Public Service Commission of the State of New York, et al.*, 360 U.S. 378, 389 (1959). United asserts, in this connection, that the testimony of its Mr. Aubin (Tr. 79) and Mr. Haring (Tr. 206) established that United received gas from the Butler B lease pursuant to the 1953 Gas Purchase Contract. And while their testimony to that effect may be challenged in the light of their other testimony, there is no challenge to Mr. Aubin's further testimony (Tr. 46-47, 79-80, 125-126 and Exhibit 29) that United received gas from acreage (not necessarily the Butler B lease) dedicated under the 1953 Gas Purchase Contract—and *Pioneer* and *Cumberland*, supra, hold that when deliveries are commenced from part of the acreage which is embraced by a certificate, dedication to interstate commerce is completed as to all of the acreage which is so embraced.

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[20] United points out, in this connection, that in *Standard Oil Company of Texas* v. *Lopeno Gas Company*, 240 F.2d (1957), the court held that a 1935 sale of "all merchantable gas which may be produced from all gas wells now drilled or which may hereafter be drilled on the described premises" covered gas which was found at a depth of 9,100 feet in 1953, even though the only known gas in 1935 was produced from depths of 2,200 to 3,000 feet.

46. United urges that the Commission should not authorize abandonment *nunc pro tunc*, among other reasons, because the fact that the Butler No. 7 Gas Well stopped producing in 1966 does not establish that "the available supply of natural gas" throughout the Butler B lease "is depleted to the extent that the continuance of service is unwarranted" within the meaning of Section 7 (b). Furthermore, United argues, the Commission's action in ordering repayments will be in support of its jurisdiction under Section 7(c) of the Natural Gas Act and will not, therefore, be based on Section 16 alone. And while the Commission has no authority to determine the validity of the 1953 Gas Purchase Contract, United concedes, nonetheless, it may consider that contract in determining the scope of Mrs. Quin's certificates—even in the face of the McComb Group's claims of invalidity. Finally, on evidentiary matters, United asserts that Judge Levy (1) properly rejected efforts to introduce evidence on antitrust matters since the activities in question terminated in 1965; (2) properly rejected end-use evidence since it would be pertinent only to a current abandonment and (3) properly received into evidence copies of signed and notarized duplicate original applications in Docket Nos. G-2997 and G-2998, among other reasons, because of their obvious authenticity and because of the numerous opportunities which the respondents have had to comment on them.

47. In opposition, the staff takes largely the same positions as United and, consequently, its arguments will not be repeated. Additionally, the staff suggests that § 154.110 of the Commission's Regulation Under the National Gas Act, which provides an exemption from the filing requirements of § 154.92(d) in the case of small producers, should not be applicable in a case such as this where the small producers are violating Section 7 of the Natural Gas Act.

Du Pont's Motion to Dismiss

48. By motion [21] on May 6, 1974, du Pont asks us to dismiss this proceeding or, in the alternative, to reconsider our show cause order, insofar as du Pont is concerned. Du Pont asserts that it is not a "natural-gas company" within the meaning of Section 2(6) of the Natural Gas Act and is not, therefore, subject to the Commission's jurisdiction, and that the Initial Decision does not order it to do anything. In an answer filed May 20, 1974, United claims that du Pont is a "natural-gas company" because it is purchasing gas which is dedicated to interstate commerce, permitting Lo-Vaca Gathering Company to use those volumes until du Pont requests delivery of comparable volumes, and must redeliver such comparable volumes to United's interstate system—"such activity places du Pont in the middle of the stream of interstate commerce". In any event, United asserts, the Commission has authority under Section 14 of the Natural Gas Act to investigate the activities of *any person* which it believes has violated or is about to violate that Act or any rule, regulation or order issued thereunder.

Discussion

49. We reject the common contention of the McCombs Group, du Pont and Haring that Section 13 of the Natural Gas Act [22] does not authorize the filing of complaints by *persons,* such as United, as does Section 306 of the Federal Power Act.[23] This proceeding was expressly commenced

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[21] Renewal of Motion to Dismiss and Motion to Reconsider Show Cause Order as to E. I. du Pont de Nemours & Company.

[22] "Sec. 13. Any State, municipality, or State commission complaining of anything done or omitted to be done . . . may apply to the Commission by petition. . . ."

[23] "Sec. 306. Any *person,* State, municipality, or State commission complaining of anything done or omitted to be done . . . may apply to the Commission by petition . . . [Emphasis added]."

under § 1.6 of the Commission's Rules of Practice and Procedure, 18 CFR § 1.6, and those rules were lawfully adopted under Sections 16 of the Natural Gas Act and 309 of the Federal Power Act, among other statutory provisions. Accordingly, this complaint proceeding was lawfully commenced under that regulatory provision which provides in pertinent part,

> "Any person, including any State or local commission, complaining of anything done or omitted to be done by any licensee, public utility or natural-gas company in contravention of an act, rule, regulation, or order administered or issued by this Commission, may file a complaint with the Commission."

50. The McCombs Group and the others are undoubtedly correct in their contention that natural gas service from the Butler B tract could not have been terminated lawfully without the Commission's having granted abandonment authorization under Section 7(b) of the Natural Gas Act. And they are undoubtedly correct in their assertion that the purpose of Section 7(b) is to require the continuance of service once it has been commenced and the public has relied on it, and further, that Section 7(b) could not as a practicable matter have served that purpose when natural gas service from the Butler B tract was discontinued in 1966 in the belief that the reserves had been depleted. But the obligation to continue natural gas service does not arise from Section 7(b) alone. It comes into existence through the acceptance of a certificate under Section 7(c) of the Natural Gas Act, the commencement of service thereunder and, finally, the prohibition of Section 7(b).

51. In determining the scope of a certificate we must look to the application including any amendments to the application which may have been filed, together with the exhibits which are part of the application and the order granting the application and issuing the certificate. We do not

reject out-of-hand the contention of the McCombs Group and the others that "service rendered" as measured by "actual deliveries" is critical, for the manner in which parties operate under a certificate could be helpful in determining its scope in appropriate cases. In this case, however, that measure appears to be of little or no help since the delivery of natural gas from a depth of approximately 2,900 feet in the Butler B tract is consistent with the positions of both the complainant and the respondents. While it is consistent with the proposition that only reservoirs to that depth were dedicated to United in interstate commerce, it is equally consistent with the proposition that reservoirs to any depth were so dedicated.

52. United claims the natural gas in question under the successor-in-interest producer certificate issued in Docket No. G-12694 on June 19, 1963,[24] at which time the Commission said,

> "A certificate will be issued in Docket No. G-12694 to H.A. Pagenkopf, Trustee (Operator), *et al.*, to continue the service initiated by Bee Quin authorized in Docket Nos. G-2997 and G-2998, and the latter certificates will be terminated."

An examination of Docket No. G-12694 indicates that the scope of the certificate issued therein must be determined from the predecessor certificates in Docket Nos. G-2997 and G-2998. As noted, those dockets apparently have been destroyed, and the purported copies of the applications contained in those dockets which were furnished by United have not been subjected to cross-examination.

53. We will avoid the foregoing infirmity of the applications for certificates in Docket Nos. G-2997 and G-2998 by determining the scope of the certificates issued therein

[24] We take official notice of Docket No. G-12694, including our order of June 19, 1963, since such documents are not part of the record.

on the basis of the best other record evidence available, principally, the Butler B lease and the 1953 Gas Purchase Contract [25] (as amended to the time the applications were filed), together with the Commission's orders issuing the certificates.[26]

54. As noted, Order No. 174-A issued August 6, 1954, spoke of two different filing dates depending upon whether the applicant-producer engaged in the particular jurisdictional activities on the date of the *Phillips* decision, *supra*, June 7, 1954. As noted, the 1953 Gas Purchase Contract was amended on September 7, 1954, sixteen days before Docket No. G-2997 was filed, to embrace additional leaseholds and to provide for the sale of oil-well gas (as distinguished from gas-well gas), and the Commission's order issuing the certificate in that Docket on December 8, 1954,

[25] Judge Levy properly refused to permit discovery and to admit evidence relevant to the validity of the 1953 Gas Purchase Contract. The certificates in Docket Nos. G-2997 and G-2998 authorized the proposed sale and continued sale, respectively, of natural gas under the 1953 Gas Purchase Contract and, consequently, the terms of that agreement are relevant to questions pertaining to the scopes of those certificates whether or not that agreement was and is valid. Furthermore, the Commission may interpret its certificates covering sales under the 1953 Gas Purchase Contract and thereby determine the rights of the parties under its certificates even though it may not directly interpret the 1953 Gas Purchase Contract to determine the rights of the parties under that agreement.

Similarly, Judge Levy properly refused to admit evidence relevant to possible abandonment because the record shows overwhelmingly that the available supply of natural gas is not depleted within the meaning of Section 7(b) of the Natural Gas Act. Whatever action the Commission may have taken under that provision from the time production ceased in 1966 until it was resumed in 1971, it cannot consider abandonment or abandonment *nunc pro tunc* where the supply of natural gas is not depleted.

[26] While copies of these orders were distributed by staff counsel, they were not made part of the record and, consequently, we take official notice of them.

spoke of a "proposed" sale. As a result, it is reasonable to conclude that the certificate in Docket No. G-2997 embraced the proposed sale of oil-well gas from the leaseholds which were subject to the 1953 Gas Purchase Contract through its amendment on September 7, 1954. No further refinement will be attempted since oil-well gas is not in issue in this proceeding.

55. It is also reasonable to conclude that the certificate in Docket No. G-2998 embraced the ongoing sale of gas-well gas [27] from the leaseholds which were subject to the 1953 Gas Purchase Contract through its amendment on September 7, 1954. As noted, Bee Quin agreed therein to sell and deliver to United, and the latter agreed to purchase and receive "merchantable natural gas . . . produced from all wells now or hereafter drilled during the [10 year] term of this contract" on the specified leaseholds, including the Butler B tract, "and Seller's proportionate part of all merchantable natural gas produced from any well or wells located on any unit or units which include any part of said lands and leaseholds . . ." In the absence of any mention of particular depths, we read that language to include gas produced from any depth and, further, gas produced beyond the term of the contract from wells which were drilled during the term of the contract. In other words, Bee Quin dedicated at least that much to United in interstate commerce.

56. As noted, the 1953 Gas Purchase Contract was amended by H. A. Pagenkopf, *et al.*, on February 7, 1961, to fix certain prices and extend its term to February 7, 1981. The Commission by order issued June 19, 1963, issued a certificate in Docket No. G-12694 authorizing H. A. Pagenkopf, Trustee, to continue the service which had been initiated by Bee Quin pursuant to authorization in Docket Nos. G-

[27] The term "natural gas" is defined in the 1953 Gas Purchase Contract, prior to amendment, to exclude oil-well gas.

2997 and G-2998, as more fully described in the application. That application was amended by H. A. Pagenkopf, Trustee, on February 14, 1961, to substitute himself as operator, and it mentions the amendment to the 1953 Gas Purchase Contract dated a week earlier, February 7, 1961. We are therefore justified in concluding that whatever limitations may have been inherent in the Bee Quin dedications, H. A. Pagenkopf, Trustee, extended the certificated Bee Quin dedications to embrace gas produced beyond the extended term from wells which are drilled during that extended term.

57. When the Bee Quin and H. A. Pagenkopf dedications are considered together, we are justified in concluding (without considering the purported applications in Docket Nos. G-2997 and G-2998) that the certificate in Docket No. G-12694 nominally [28] covers the merchantable natural gas produced from any depth and from all wells drilled through February 7, 1981, on the leaseholds subject to the 1953 Gas Purchase Contract through its amendment on February 7, 1961. And we are justified in concluding additionally, that it covers all gas produced from those wells to the extent that those leaseholds are not unitized—and to the extent that they are unitized, it covers an allocable portion of the gas produced from those wells together with the allocable portions of the gas produced from wells on the leaseholds which are unitized with them. Of critical importance to this proceeding, it covers all of the gas which has been produced from or attributable to the Butler B lease since gas was rediscovered at deeper depths late in 1971.

58. Having thus determined the scope of the certificate in Docket No. G-12694, it would not be inappropriate to

[28] The scope of the certificate is said to be "nominal" because, for practicable purposes, service thereunder cannot lawfully be discontinued under Section 7(b) until "the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or . . . the present or future public convenience or necessity permit such abandonment."

turn to the purported applications in Docket Nos. G-2997 and G-2998 to confirm or reject our findings. Since United is a party to the 1953 Gas Purchase Contract and its amendments it is reasonable that United would have copies of the applications in those dockets among its business records. Furthermore, the copies furnished by United purport on their faces to bear the notarized signatures of Bee Quin, and we note from Exhibit 23 that "Mrs. S. J. Granberry (formerly Bee Quin)" was a partial owner of McCombs-Butler Gas Unit Nos. 1 and 2 as of May 18, 1972. While the McCombs Group and the others assert, as noted, that they "most assuredly challenge the accuracy and authenticity" of the copies furnished by United, they do not claim that they are not true copies of the applications which were filed in Docket Nos. G-2997 and G-2998, at least in material respects. If the McCombs Group and the others had anything to offer, in this regard, there is little doubt that they would have brought it forward by this time.

59. The description of the "Service To Be Certificated" in the purported application in Docket No. G-2997 states in pertinent part:

> "Applicant was not selling gas from the leases covered by this application on June 7, 1954; but to comply with the regulation of the Railroad Commission of the State of Texas for the purpose of preventing waste of natural gas, applicant proposes to to [sic.] sell natural gas to United Gas Pipe Line Company commencing on October 25, 1954, pursuant to a contract amendment dated September 7, 1954. . . ."

and the similar description in the purported application in Docket No. G-2998 states:

> "On and since June 7, 1954, applicant has sold and delivered natural gas to United Gas Pipe Line Company, a corporation, at the well site of each of applicant's wells in the South Porter Gas Field, Karnes

> County, Texas, pursuant to a contract which is attached hereto as Exhibit 'C' ".

We conclude that there is nothing in the purported applications that causes us to change our findings as to the scope of the certificate in Docket No. G-12694.[29]

60. Having determined the scope of its certificate in Docket No. G-12694, it is appropriate to turn to the question of whether service commenced thereunder or under its predecessor certificates. While there is some record evidence, in this connection, that United received gas from the Butler B lease,[30] there is substantial unchallenged record evidence that United received gas from acreage (not necessarily the Butler B lease) which is dedicated to it under the 1953 Gas Purchase Contract.[31] And *Pioneer* and *Cumberland,* supra, as well as the recent decision in *Mitchell Energy Corporation,* Docket No. CI75-296 (Opinion No. 733 issued June 11, 1975), hold that when deliveries are commenced from part of the acreage which is embraced by a certificate, dedication to interstate commerce is completed as to all of the acreage which is so embraced.

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[29] While there is a challenge as to whether a copy of the 1953 Gas Purchase Contract was in fact the attachment designated as Exhibit "C", it is established that the copy of the 1953 Gas Purchase Contract in evidence is a true copy of the agreement under which United purchased natural gas from Bee Quin and her successors in interest.

[30] T. L. Aubin, Jr., General Manager of United's Gas Acquisition Department, testified (Tr. 80) that United stopped receiving deliveries from the Butler B lease in September 1966, and Respondent Haring testified (Tr. 206) that there were some deliveries of natural gas to United from the Butler No. 7 well on the Butler B tract in 1966.

[31] For example, Mr. Aubin testified (Tr. 46-7) that United received natural gas for its interstate pipeline system pursuant to the certificates in Docket Nos. G-2997, G-2998 and G-12694.

61. Furthermore, there is no challenge to the Commission's finding in its order of June 19, 1963, that Bee Quin had initiated the service authorized in Docket Nos. G-2997 and G-2998. The commencement of service completed the dedications to United in interstate commerce and thereby invoked the protection of Section 7(b).

62. As is implicit in the foregoing conclusion that United was and continues to be entitled to gas *attributable* to the Butler B lease, we are giving effect to the principles of unitization embodied in the Butler B lease and appearing in the 1953 Gas Purchase Contract which, in effect, authorize the transformation of the independent Butler B leasehold into an undivided part of a larger leasehold. As noted, the Butler B lease authorizes the unitization of that leasehold or any portion of it and provides that the production of gas from "any portion of any such unitized area in which all or any part of the land described herein is embraced, shall have the same effect as though a well had been commenced or completed on the land herein described or production obtained under the terms hereof." And, as noted, the 1953 Gas Purchase Contract specifically embraces the "proportionate part of all merchantable natural gas produced from any well or wells located on any unit or units which included any part" of the leaseholds embraced thereby.

63. While it may be argued that acceptance of the principles of unitization as part of the terms and conditions of a producer certificate would permit the operator of a leasehold which is dedicated to interstate commerce to deliver part of the gas underlying that leasehold in intrastate commerce if he should unitize that leasehold with an adjoining one which is not so dedicated, acceptance of those principles would also bring into interstate commerce a proportionate part of the gas underlying the adjoining leasehold which is not so dedicated. In any event, in the context of unitization there is nothing sacrosanct about the physical location of natural gas at any point in time. Since unitization is authorized only with respect to leaseholds in the same general area, and since there is no relationship between the surface boundaries of leaseholds and the subsurface limits of natural gas reservoirs, and since natural gas flows under fluidic principles, natural gas wells on adjoining leaseholds frequently tap the same reservoirs and, as a result, a well on a leasehold which is not dedicated to interstate commerce is as likely to produce any given molecule of gas as one on a dedicated leasehold, regardless of the physical location of that molecule as underlying one or the other of the leaseholds at some other point in time. On balance, therefore, our acceptance of the principles of unitization as part of the terms and conditions of the certificates in Docket Nos. G-2997 and G-2998, initially, and in Docket No. G-12694, currently, appears to offer a practicable solution for resolving controversies arising from the interacting complexities of natural gas formations and modern business relationships.

64. While the record is incomplete for the purpose of determining the precise quantities of natural gas to which United is entitled, the principles of unitization suggest the following results:

A. United was not entitled to any of the gas from the McCombs Group's Butler No. 1 Well in the Butler A tract from the time of its completion in September 1971 until McCombs-Butler Gas Unit No. 1 embracing the production depths of that well was designated effective November 1, 1971. Thereafter, United was entitled to 42.9658% of the gas produced from that well until it was shut in.

B. United was and continues to be entitled to 42.9658% of the gas produced from the McCombs Group's Butler No. 2 Well in the Butler A tract within the depths embraced by McCombs-Butler Gas Unit No. 1 from the time of its completion in February 1972. United was not entitled to any gas from other depths of that well from the time of its completion until McCombs-Butler Gas Unit No. 2 embrac-

ing those other production depths was designated on April 3, 1972. Thereafter, United was and continues to be entitled to 52.0767% of the gas produced from that well within the depths embraced by McCombs-Butler Gas Unit No. 2.

C. United was and continues to be entitled to 42.9658% of the gas produced from the McCombs Group's Butler No. 3 Well in the Butler B tract from the time of its completion in September 1972. While that well produces from three depths, according to the record, all are embraced by McCombs-Butler Gas Unit No. 1.

D. United was and continues to be entitled to 42.9658% of the gas produced from the McCombs Group's Butler No. 4 Well in the Butler A tract within the depths embraced by McCombs-Butler Gas Unit No. 1 from the time of its completion in October 1972 and 52.0767% of the gas produced from the well within the depths embraced by McCombs-Butler Gas Unit No. 2, also from the time of its completion.

E. Similarly, United was and continues to be entitled to 14.2045% of the gas produced from the unnamed unit designated by National Exploration on or about November 1, 1971. On the other hand, National Exploration should be entitled to a credit for the volumes of gas which it sold to United notwithstanding that it did not purport to do so pursuant to the certificate in Docket No. G-12694.[32] Any

[32] National Exploration asserts that it was not selling natural gas in intrastate commerce and in violation of Section 7 of the Natural Gas Act because it fulfilled its obligation by selling more gas to United than it produced from the Butler B lease. Under the principles of unitization, however, National Exploration could fulfill its obligation, volumetrically speaking, only by selling United at least 14.2045% of the gas produced from the unit designated by it regardless of the source of that gas as being produced from the Butler B lease or from some other leasehold within the unit. The record does not show how much gas was produced from National Exploration's unit.

excess of the purchase price over the price ultimately fixed on remand should be refunded to United with interest.

65. From the foregoing, United appears to be entitled to 42.9658% of the gas produced from the Butler Nos. 2 and 4 Wells within the depths embraced by McCombs-Butler Gas Unit No. 1 and 52.0767% of the gas produced from those wells within the depths embraced by McCombs-Butler Gas Unit No. 2. Since this proceeding must be remanded to determine the amounts of United's volumetric entitlements within the framework hereof, the parties are directed to provide and file the best evidence available to determine the volumes produced from the depths embraced by each of those units or, if that is not practicable, to offer and support alternative ways to allocate the gas from the Butler Nos. 2 and 4 Wells in the light of United's entitlement to different percentages of the commingled production of those wells.

66. The principles of unitization would also suggest that United is entitled to receive more than its proportionate share of the production until such time as United is made whole for any portion of its share which it did not receive in the past. The plan suggested by United to divert to it all of the production of the respective units until lost volumes are recovered appears to be feasible and to avoid the pitfalls raised by the McCombs Group and the others. However, since remand is necessary, the operators of the respective units will be required to file plans for making United whole for the volumes which were delivered to others and such plans will be considered on remand. See Opinion Nos. 724 and 724-A (*Blair-Vreeland,* Docket No. CI74-331), issued March 18, and May 14, 1975, respectively.

67. The McCombs Group and the others correctly point out that § 154.110 of the Commission's Regulations under the Natural Gas Act specifically provides that § 154.92, *et seq.*, shall not apply to small producer sales made under small producer certificates. While Judge Levy therefore

erred in ordering the members of the McCombs Group and the others to file an application for a successor certificate pursuant to § 154.92(d), such a course appears to be a practicable one and there is nothing to prevent the respondents from following it if they so choose.

68. As small producers, the members of the McCombs Group and the others may sell the natural gas in question to United under their small producer certificates without any direct constraints as to price. It seems unlikely, however, that the parties will be able to negotiate an arms-length price under circumstances where some of them are required to deliver the gas to one of them. As a result, it is appropriate to establish certain parameters for negotiating a rate or rates notwithstanding the respondent-sellers' common status as small producers.

69. No rate justification will be required on remand if the parties agree upon rates which large producers could have charged without special justification. In other words, no justification will be required if they agree upon rates which do not exceed the maximum applicable area rate under Opinion No. 595 and the maximum national rate under Opinion No. 699 on the assumption that separate sales were made immediately upon the completion of each well. On the other hand, the respondent-sellers will be required to justify their proposed rates if the parties do not reach agreement within those parameters. And an appropriate vehicle for seeking justification would be an application pursuant to § 154.92(d) of the Commission's Regulations under the Natural Gas Act for a successor certificate which would effect a termination of the certificate in Docket No. G-12694 and establish a new rate or rates for the respondent-sellers' sales to United.

70. We will defer ruling upon du Pont's motion to dismiss this proceeding as to it until United is made whole for its entitlements which were delivered to others. Du Pont was named as a respondent because it is purchasing natural

gas from the McCombs Group in a transaction which is intrastate and does not, therefore, come within the Natural Gas Act so long as the McCombs Group delivers to Lo-Vaca Gathering Company on behalf of du Pont natural gas which is produced by the McCombs-Butler Gas Unit Nos. 1 and 2 and is not attributable to the Butler B lease. Although it is argued that du Pont is a "natural-gas company" because it is purchasing gas which is produced by those units and is partly attributable to the Butler B lease which has been dedicated to United in interstate commerce, du Pont is not the operator of those units and need not be subjected to any Commission directive unless and until the McCombs Group refuses or fails to comply with our order to make United whole for its Butler B entitlements. When that becomes an accomplished fact we can grant du Pont's motion without deciding whether it has become a "natural-gas company".

71. As the record has developed, we are satisfied that the violations of Section 7 which we find herein commenced in such a manner and continued under such circumstances that we should not, in the exercise of our discretion at this time, transmit evidence concerning them to the Attorney General pursuant to Section 20(a) of the Natural Gas Act for possible criminal proceedings. As noted in paragraph 16, the McCombs Group did not learn of United's interest in the Butler B lease until December 1971, a month after McCombs-Butler Gas Unit No. 1 was designated. And as indicated in paragraph 17, there was some belief even then that United had released the 1953 Gas Purchase Contract. Furthermore, it appears from paragraph 20 that National Exploration did not learn of United's interest until late 1972 or early 1973, some months after it drilled two gas wells in the Butler B tract. Even United negotiated to purchase Butler B gas from the McCombs Group in late 1971 and early 1972 but did not firmly recognize its interest in that gas until it was notified by National Exploration in January 1973 and received the results of a title search

several months later. And although Judge Levy ordered the respondents to "cease and desist the sales currently being made to the intrastate market of gas produced from the Butler B lease", he did not set a date for doing so and order them to comply forthwith with the certificate in Docket No. G-12694. As a result, we cannot say that any respondent has willfully and intentionally violated Section 7 of the Natural Gas Act. We believe that our actions herein, particularly those set out in Ordering Paragraphs (A) and (B), will best serve the public interest under the circumstances which are before us.

The Commission orders:

(A) Billy J. McCombs, R. James Stillings, d/b/a Gastill Company, David A. Onsgard, Basin Petroleum Corporation, Louis H. Haring, Jr., National Exploration Company and Bill Forney, all of whom are respondents herein and holders of small producer certificates of public convenience and necessity, shall sell and deliver to United Gas Pipe Line Company in interstate commerce in compliance with the Commission's certificate in Docket No. G-12694, and from the production from their respective gas units embracing portions of the Butler B lease, not less than all of the natural gas which is attributable to their respective interests in the Butler B lease, said sale and deliveries to commence 45 days after the date of this opinion and order, or as soon thereafter as United Gas Pipe Line Company physically connects gathering facilities to receive the gas, at interim rates subject to refund which are equal to the maximum rates applicable to holders of large producer certificates of public convenience and necessity in their situation, i.e., the maximum area rate under Opinion No. 595 and the maximum national rate under Opinion No. 699, on the assumption that separate sales of natural gas were made to United Gas Pipe Line Company immediately upon the completion of each well from which the production is derived.

(B) Within a reasonable period of time to be determined by an administrative law judge, the said respondents shall sell and deliver to United Gas Pipe Line Company in interstate commerce for civil violation of the Commission's certificate in Docket No. G-12694, such volumes of natural gas which are equal to (1) the volumes of natural gas which were produced from their respective interests in the Butler B lease to the extent that such lease was not unitized with other leaseholds and to the extent that said volumes were delivered to others, plus (2) the volumes of natural gas which were attributable to their respective interests in the Butler B lease to the extent that such lease was unitized with other leaseholds and to the extent that said volumes were delivered to others, in both cases the production commencing in 1971 and ending on the date specified in Ordering Paragraph (A). Pending compliance or non-compliance with this Ordering Paragraph (B), decision upon the Renewal of Motion to Dismiss and Motion to Reconsider Show Cause Order as to E. I. du Pont de Nemours & Company, is deferred.

(C) The record of this proceeding is reopened and the said respondents shall file within 45 days after the date of this opinion and order (1) data commencing in 1971 showing the volumes of natural gas which were produced from and/or were attributable to their respective interests in the Butler B lease (including the evidence specified in paragraph 65), and also showing the amounts delivered to United Gas Pipe Line Company and the amounts delivered to others, (2) a plan or plans to carry out Ordering Paragraph (B), (3) their evidence to support such plan or plans and (4) copies of contracts establishing a rate or rates for the sales specified in Ordering Paragraphs (A) and (B) within the parameters of paragraph 69 or, if agreement within those parameters is not reached, such other filings selected by them to establish a rate or rates for the said sales, including possibly an application or applications under Section 154.92(d) of the Commission's Regulations under the

Natural Gas Act for a successor certificate or certificates which would effect a termination of the certificate in Docket No. G-12694 and establish a rate or rates for the said sales, in any case, together with their evidence to support the said rate or rates.

(D) The parties shall file within 60 days after the date of this opinion and order any opposing data, plans, evidence or other matters which they may proffer.

(E) This proceeding is remanded to an administrative law judge (1) to determine the respective volumes of natural gas which the parties are required to sell and deliver to United Gas Pipe Line Company in compliance with Ordering Paragraph (B), (2) to consider and adopt a plan or plans to carry out Ordering Paragraph (B) and (3) to consider and adopt a rate or rates for the sales specified in Ordering Paragraphs (A) and (B) and for the volumes sold and delivered by National Exploration Company to United Gas Pipe Line Company.

(F) The Secretary is authorized to consolidate with this proceeding on remand any applications which may be filed pursuant to Ordering Paragraph (C) to establish a rate or rates for the sales specified in Ordering Paragraphs (A) and (B) and for the volumes sold and delivered by National Exploration Company to United Gas Pipe Line Company.

(G) The hearing herein shall be commenced within 75 days after the date hereof or within 15 days after the date on which responses shall be due on the last application which may be filed pursuant to Ordering Paragraph C, whichever date is later.

(H) By order issued June 17, 1975, the record was reopened and this proceeding was remanded to an administrative law judge for the limited purpose of admitting, supporting and considering a proposed settlement. Whether

or not that settlement is in the public interest shall be determined in the light of this opinion and order.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

(Caption Omitted in Printing)

OPINION NO. 740-A

Opinion and Order Denying Rehearing, Modifying Ordering Provisions, Dissolving Stay, Noticing Phasing of Proceeding, Acting on Emergency Relief, Denying Appeal, Denying Without Prejudice Compliance Order and Denying Reconsideration

(Issued November 7, 1975)

1. In Ordering Paragraph (A) of Opinion No. 740 issued August 20, 1975, we ordered respondents Billy J. McCombs, R. James Stillings, d/b/a Gastill Company, David A. Onsgard, Basin Petroleum Corporation and Bill Forney (collectively, the McCombs Group), together with respondents Louis H. Haring, Jr. and National Exploration Company, to sell and deliver to United Gas Pipe Line Company (United) "from the production from their respective gas units embracing portions of the Butler B lease, not less than all of the natural gas which is attributable to their respective interests in the Butler B lease, said sale and deliveries to commence 45 days after the date of this opinion and order. . . ." On September 11, 1975, the members of the McCombs Group together with respondent E. I. du Pont de Nemours & Company (du Pont) filed an application for rehearing and motion for stay pursuant to Section 19(a) of the Natural Gas Act and §§ 1.34 and 1.12 of our Rules of Practice and Procedure asking us to grant rehearing of Opinion No. 740 and stay its ordering provisions.

2. The McCombs Group and du Pont asserted, among other matters, that McCombs-Butler Gas Unit Nos. 1 and 2 were dissolved by instrument entitled "Dissolution of Units" dated May 29, 1974, and recorded October 21, 1974, and further, that the instrument provides that the said

units are cancelled, rescinded and dissolved "effective the date that each of the Unit Declarations was filed of record in Karnes County, Texas." According to the McCombs Group and du Pont, "the effect of this document is to restore the Butler A and B Leases to their separate status, *ab initio*."

3. The McCombs Group and du Pont specified twenty-six errors designated A through Z, respectively, most of which were repetitive of their earlier positions to Administrative Law Judge William C. Levy and, later, to us. Two of the alleged errors related to matters which occurred after the date of Judge Levy's Initial Decision and, therefore, were being raised for the first time. In the one they asserted in greater detail that we failed to consider the pending settlement proposal, and in the other they claimed, also in greater detail, that we erred in not considering the dissolution of McCombs-Butler Gas Unit Nos. 1 and 2. We granted rehearing and a limited stay on September 18, 1975, to afford an opportunity to respond to those newly raised issues and to allow time for their consideration together with the issues raised in their motion for a stay.

The Settlement Proposal Issue

4. The McCombs Group and du Pont assert that the only reference in Opinion No. 740 to the settlement which is pending before Administrative Law Judge Thomas L. Howe[1] is contained in Ordering Paragraph (H) which states,

> "By order issued June 17, 1975, the record was reopened and this proceeding was remanded to an administrative law judge for the limited purpose of admitting, supporting and considering a proposed settlement. Whether or not that settlement is in the public

[1] Designated in this proceeding to replace Judge Levy who has retired.

interest shall be determined in the light of this opinion and order."

And they claim that the foregoing provision precludes a full and meaningful consideration of the settlement proposal on its merits as is required by *Michigan Consolidated Gas Company* v. *Federal Power Commission*, 283 F.2d 204 (CADC, 1960), *cert. denied* 364 U.S. 913 (1960), wherein the court said,

> "Even assuming that under the Commission's rules Panhandle's rejection of the settlement rendered the proposal ineffective *as a settlement*, it could not, and we believe should not, have precluded the Commission from considering the proposal *on its merits*."

5. United, in an answer filed October 3, 1975, asserts that it terminated the settlement proposal as between it and the McCombs Group by letter dated September 17, 1975, and, as a result, that proposal is a "newly-proposed unilateral offer of settlement which United does not support." In addition, United asks for clarification of the phrase in Ordering Paragraph (H), "in the light of this opinion and order", suggesting that it might be construed to refer to benefits which are at least equal to those that would have been received under Opinion No. 740, or that it might be construed to refer to benefits which approach but do not equal those under Opinion No. 740.

6. The Commission staff, in an answer also filed October 3, 1975, points out that Opinion No. 740, among other matters, requires the production of certain data which are essential to an evaluation of the adequacy of the settlement and, consequently, to consideration of the proposal on its merits. In addition, the staff asserts that the settlement cannot yet be reviewed on its merits because the McCombs Group has not fulfilled the staff's outstanding data request.

7. While the McCombs Group and du Pont argue that the settlement proposal is in the public interest in the light of data in the record, we find that their claimed record data consist principally of prepared testimony which was filed on July 16, 1975, but which had not, as of August 20, 1975, the date of issuance of Opinion No. 740, been verified on the record by the witness who, in turn, had not been cross-examined. United, on the other hand, argues that while there is record evidence (Tr. 240) that the McCombs Group sold 10.5 to 11 Bcf of natural gas to du Pont through December 1973, the settlement offer would make a maximum of only 8.5 Bcf available to it and, consequently, that offer is not in the public interest.

8. The portion of *Michigan Consolidated*, supra, which is quoted by the McCombs Group and du Pont and repeated hereinabove is followed immediately by the statement,

> "Indeed, the proposal appears prima facie to have merit enough to have required the Commission *at some stage of the proceeding* to consider it on its own initiative as an alternative . . . [Emphasis added]."

Although United no longer supports the settlement proposal, at least insofar as it relates to the McCombs Group, we believe that so long as the offer remains open Judge Howe should continue to consider it on its merits as an alternative to the disposition of this proceeding set out in Opinion No. 740 and modified herein. A settlement by its nature involves give and take, including human estimates of the likelihood of prevailing and of the likelihood of realizing the fruits. As a result, some may view a given settlement as providing benefits which are at least equal to those which would have been won while others may view the same settlement as merely approaching those benefits. The question, as we see it in this proceeding, is whether the settlement strikes a fair bargain under all of the circumstances, including our decision in Opinion No. 740 and

modified herein as to United's natural gas entitlements. Gas in United's pipeline may well be worth the right to receive twice as much from the field provided, of course, that the field and producer records are opened sufficiently to permit an informed judgment as to the prospects of United's customers' realizing the fruits of United's litigation.

9. We agree that United's withdrawal of its support for the settlement proposal renders the proposal ineffective *as a settlement* of so much of this proceeding as pertains to the McCombs Group. Nonetheless, we believe that as long as the members of the McCombs Group hold open the offer which is embraced by the settlement proposal the presiding administrative law judge should continue to consider the proposal *on its merits* as one of the possible alternative dispositions of this proceeding. *Michigan Consolidated Gas Company* v. *Federal Power Commission*, 238 F.2d 204, cert. den. 364 U.S. 913 (1960). Such consideration would not, of course, prevent the presiding judge from modifying or totally rejecting the proposal upon ventilation of its merits.

10. On May 8, 1975, when the settlement proposal was submitted to us, the record in this proceeding was incomplete for the purpose of determining the volumes of United's natural gas entitlements and suitable rates respecting the Butler B lease. We could not consider the merits of the settlement proposal partly because it embraced wells and mineral leases which had not previously been involved in this proceeding and partly because of the state of the record with respect to United's natural gas entitlements and, as a result, on June 17, 1975, we set the matter to hearing before an administrative law judge "for the purpose of receiving and considering evidence to support the proposed settlement . . . fully on its merits". Formal development of the record had not been commenced when we issued Opinion No. 740 on August 20, 1974, and, consequently, that opinion is not a final decision as to volumes

and rates and remands the proceeding to develop a record in those areas.

11. Further development of the record is necessary for the ultimate disposition of this proceeding. Although United does not support the pending settlement proposal or offer, as the case may be, with the members of the McCombs Group and du Pont, apparently it continues to support the separate pending settlement proposals with Louis H. Haring, Jr. and National Exploration Company. It seems to us that the determination of volumes and rates under Opinion No. 740 and modified herein is intertwined with the question of whether any or all of the foregoing are in the public interest and, therefore, that the more efficient procedure would be to develop the record with respect to all of these questions, and to consider all of them, at one time. In any event, we believe that we are proceeding properly under *Michigan Consolidated*, supra, to consider the settlement on its merits as an alternative to the disposition of this proceeding set out in Opinion No. 740 and modified herein. Accordingly, we find no merit in the McCombs Group's and du Pont's alleged error.

The Dissolution of Units Error

12. The McCombs Group and du Pont assert that we did not have before us and hence failed to consider the dissolution of McCombs-Butler Gas Unit Nos. 1 and 2 subsequent to the hearing and Judge Levy's Initial Decision. They assert that we failed to consider reserve and production data respecting the Butler B lease and the reserves offered in settlement, and further, that evidence pertaining to these matters was admitted into the record at a hearing before Judge Howe on August 28 and 29, 1975.

13. Their claim is self-defeating since it shows on its face that we did not have the evidence in question before us and, therefore, that we could not have erred in failing to consider it. Furthermore, the evidence in question had

not been admitted into the record on August 20, 1975, the date on which Opinion No. 740 was issued, and after it was admitted that part of the record remained before Judge Howe. Apparently anticipating the latter objection, the McCombs Group and du Pont submitted a copy of the record as developed on August 28 and 29, 1975, as an appendix to their application for rehearing; but on reading it we find, particularly in the light of the alleged surprises and insufficient time to prepare for cross-examination, Judge Howe's ruling to allow further cross-examination when the hearing resumes and the data requests made therein, that the record as developed on August 28 and 29, 1975, is only part of the overall record to be developed pursuant to our order of June 17, 1975, and Opinion No. 740. Accordingly, the record is still incomplete for the purpose of considering the settlement proposal or offer, as the case may be, on its merits.

14. While we therefore find no merit in the McCombs Group's and du Pont's alleged error, they have placed before us evidence of the dissolution of McCombs-Butler Gas Unit Nos. 1 and 2. And although that evidence has not been fully tested or rebutted, we find, nonetheless, that it is substantial in the legal sense and that we should consider modifying Ordering Paragraph (A) of Opinion No. 740 which directs the respondents to begin to deliver natural gas to United from those gas units.

15. The staff asserts that while the effectiveness of the dissolution of the McCombs-Butler Gas Unit Nos. 1 and 2 is not clearly established as a matter of state law, neither is it relevant. Citing Opinion No. 467 *(Cumberland Natural Gas Company, Inc., et al.,* Docket Nos. G-18740 *et al.*), 34 FPC 132 (1965) and *Atlantic Richfield Company, FPC Gas Rate Schedule Nos. 337 and 354,* 50 FPC 258 (1973), and analogous situations, the staff takes the position that Section 7(b) of the Natural Gas Act applies to the dissolution of the units since such dissolution would effect a partial abandonment of service. It points out, in

this connection, that witness Bill Forney, Jr.[2] testified (Tr. 387-388) that it was fair to say that the paramount reason for dissolving the units was the possibility that the Federal Power Commission might direct the delivery of reserves produced from the Butler A lease to United and, according to the staff, it is difficult to regard the dissolution as anything more than an attempt to evade the Commission's jurisdiction.

16. United takes the position that the record as developed on August 28 and 29, 1975, is insufficient to show that the units have been dissolved, and further, that even if the units were dissolved on October 21, 1974, the date on which the instrument entitled "Dissolution of Units" was recorded, such dissolution could not retroactively alter United's rights under the Natural Gas Act.

17. In a response filed October 3, 1975, the McCombs Group and du Pont assert that United can have no rights to Butler A gas under the Natural Gas Act because there were no deliveries of natural gas in interstate commerce from a unitized Butler B lease, and further, that the creation and dissolution of pooling units come within the "production or gathering" exemption of Section 1(b) of the Natural Gas Act. They say that the units were dissolved to prevent United from enjoying a windfall since the Butler A and B leases would not have been pooled if the respondents had been aware of United's claim to the Butler B gas.

18. In reliance upon *The United Gas Improvement Company* v. *Continental Oil Company, et al.,* 381 U.S. 392 (1965), we believe that the "production or gathering" exemption of Section 1(b) relates to the physical activities, processes and facilities of production or gathering, but not to sales affirmatively subjected to Commission jurisdiction, including the formation and dissolution of production

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[2] Not to be confused with respondent Bill Forney, his father.

units and certificate obligations under the Natural Gas Act.

19. McCombs-Butler Gas Unit Nos. 1 and 2 were apparently formed to obviate the drilling of offset wells on the Butler B lease to prevent the drainage of reservoirs underlying both the Butler A and B leases through wells which had been completed on the Butler A lease. And the significant economic fact appears to be that the dissolution of those units was motivated by the possibility that we might order the members of the McCombs Group to deliver to United the gas which they are producing from the Butler A lease and selling to du Pont at a current price of $1.04 per Mcf, subject to a Btu adjustment. By way of comparison, the current maximum national rate under Opinion No. 699 is $.52 per Mcf and the current maximum rate for small producers under Opinion No. 742, infra, is 130% of that rate, or $.676 per Mcf.

20. We do not subscribe to the staff's position that dissolution of those units requires our abandonment authorization under Section 7(b) of the Natural Gas Act. Let us assume hypothetically that United is entitled to receive 100% of the natural gas which is produced from Whiteacre, a one-acre leasehold which is dedicated to interstate commerce; that Whiteacre is unitized with Blackacre, a three-acre leasehold which is not so dedicated; and, consequently, that United becomes entitled to receive 25% of the natural gas which is produced from Grayacre, the resulting four-acre unit. We could take the position that United's loss of 75% of the Whiteacre gas incident to the formation of Grayacre requires our abandonment authorization under Section 7(b). Similarly, we could take the position, suggested by the staff, that if Grayacre is dissolved United's loss of 75% of the Grayacre gas attributable to Blackacre (which could also be described as its entire 25% interest in the Blackacre gas) requires our abandonment authorization. We did not take the first of

these positions in Opinion No. 740, rationalizing in paragraph 63 that there is an offsetting *quid pro quo* when a unit is formed. Similarly, we believe that there is an offsetting *quid pro quo* when a unit is dissolved, for United will again become entitled to receive 100% of the gas produced from Whiteacre, and we would thereby distinguish *Cumberland* and *Atlantic Richfield*, supra.

21. If we recognize the attempted dissolution of those units for the purpose of the Natural Gas Act we would thereby leave the Butler B lease, which is dedicated to interstate commerce, in a disadvantaged position, as its underlying natural gas reservoirs are being drained by wells on the Butler A lease. In our view the significant economic fact set out in the second preceding paragraph is also the determinative fact, and in reliance upon *The United Gas Improvement Company*, supra, tentatively, we will not recognize the attempted dissolution for the purpose of the Natural Gas Act and, in particular, for the purpose of determining an appropriate modification of Ordering Paragraph (A) of Opinion No. 740.[3] We realize that the record may be incomplete with respect to the reason(s) for the attempted dissolution of the units, but if it should turn out that there were bona fide other reasons for dissolving them and, consequently, that United is entitled to less gas than it will receive under Ordering Paragraph (A) of Opinion No. 740 as modified herein, any excess deliveries to United can be offset against the volumes to which it is entitled under Ordering Paragraph (B) of Opinion No. 740.

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[3] Under ordinary circumstances we would say that the parties in interest are free to form and dissolve natural gas producing units at will when the leaseholds and agreements underlying a particular certificate of public convenience and necessity authorize such action. However, we view the situation before us as extraordinary since the attempted dissolution apparently was not motivated by technical and economically related considerations.

22. We said in our order issued herein on September 18, 1975, "We will modify Ordering Paragraph (A) [of Opinion No. 740] to fit the present circumstance that the major portion of the Butler B lease may no longer be unitized." Tentatively, and subject to our further order, we find that the Butler B lease continues to be unitized for the purpose of the Natural Gas Act to the same extent as immediately prior to the attempted dissolution of McCombs-Butler Gas Unit Nos. 1 and 2. Accordingly, we will modify Ordering Paragraph (A) to carry out its original intent while avoiding the *sub silentio* references therein to McCombs-Butler Gas Unit Nos. 1 and 2, to provide a new commencement date for the sales and deliveries specified therein in the light of our limited stay and to provide for new pricing mechanism in view of the issuance of Opinion No. 742 on August 28, 1975, amending Section 157.40 of the Commission's Regulations Under the Natural Gas Act to provide just and reasonable rate differentials for sales of natural gas by holders of small producer certificates of public convenience and necessity.[4]

MOTION FOR STAY

23. The McCombs Group and du Pont ask for a stay of the ordering provisions of Opinion No. 740 claiming, among other matters, that they would be irreparably injured in the absence of a stay:

> "The order directing deliveries to United disrupts the McCombs Group's existing contractual relationship with du Pont, and has serious consequences on the parties, involving several millions of dollars, which are impossible to repair. The McCombs Group would be required to receive payment for gas delivered to United at a rate far less than the current ap-

[4] We will also modify Ordering Paragraph (C) of Opinion No. 740 in view of the issuance of Opinion No. 742.

> plicable contract price of $1.04 per Mcf under the du Pont contract. Du Pont will be deprived of gas which it is rightfully entitled to receive, and which cannot be repaid. Similarly, the McCombs Group may be subjected to claims for damages from its royalty and overriding royalty interest owners, and from du Pont. A more clear case of irreparable injury is difficult to conceive."

Taking opposite positions to the McCombs Group and du Pont under *Virginia Petroleum Jobbers Association* v. *Federal Power Commision*, 259 F.2d 921 (CADC, 1958), United and the staff assert that if a stay is granted United and its customers would be injured in a far more substantial manner than the McCombs Group and/or du Pont if a stay is denied. Except for the unsupported claim that du Pont would be deprived of gas which cannot be repaid, it seems to us that each of the foregoing items of alleged injury is compensable in money damages and, consequently, that they do not rise to the status of irreparable injury in the legal sense. And while admittedly gas is getting more difficult to purchase and commensurately more expensive, we are not prepared to conclude in the absence of a special showing that the gas cannot be replaced by du Pont in kind and, if not, that du Pont would be irreparably injured by its inability to replace the gas.

24. In our order issued in this proceeding on September 18, 1975, we stayed the commencement of the sale and deliveries of natural gas pursuant to Ordering Paragraph (A) of Opinion No. 740 in order to afford an opportunity to respond to the issues raised by the McCombs Group and du Pont in their application for rehearing and motion for stay and to allow time for consideration of those issues. That time expires with the issuance of this Opinion No. 740-A on rehearing, and we are dissolving our stay in Ordering Paragraphs (A) and (D) hereof.

BUTLER A LEASE

25. As noted in paragraph 5 of Opinion No. 740, the 1953 Gas Purchase Contract was amended on September 7, 1954, shortly before Bee Quin filed her certificate applications, to embrace additional leaseholds and provide for the sale of oil-well gas. In its answer filed October 3, 1975, the staff asserts that the Butler A tract was included in the Bee Quin dedications when she applied in Docket Nos. G-2997 and G-2998 for certificates of public convenience and necessity, and that the natural gas underlying the Butler A lease through which the McCombs Group, du Pont and respondent Louis H. Haring, Jr., claim their interests, is dedicated to United in interstate commerce. The staff notes, in this connection, that in Opinion Nos. 737 (*El Paso Natural Gas Company, et al., Docket Nos. CP75-209,* et al.), issued July 11, 1975,[5] the Commission said,

> "[I]t makes no difference whether a lease is transferred or terminates, the obligation of service imposed on the dedicated gas continues."

26. T.L. Aubin, Jr., General Manager of United's Gas Acquisition Department, testified (Tr. 118):

> "If I am not mistaken we did purchase gas off the Butler A tract. If I recall it was a tract that was subject to the specific contract in question here."

That contract as amended on September 7, 1954, embraces the following leasehold described therein:

> "That certain oil, gas and mineral lease dated April 20, 1948, from Hallie Butler Hunter, et al, lessor, to W.R. Quin, lessee, covering 150 acres of land in Karnes County, Texas, said lease being recorded in Volume 175, Page 198, Deed Records, Karnes County, Texas, reference being made to said lease and the record thereof for all purposes."

[5] Rehearing denied, Opinion No. 737-A, issued September 3, 1975.

Judging from the acreage, location, date and parties, it would appear, and we conclude, that the foregoing is a description of a lease of the Butler A tract. Counsel for United stated, in this connection, (Tr. 120) that the Butler A tract was under the 1953 Gas Purchase Contract, that the lease pertaining thereto expired for lack of production and that "the right to purchase gas would have likewise expired with the expiration of the lease." Immediately prior to counsel's statement Judge Levy refused to allow the proceeding to expand into the Butler A tract stating, "We are only concerned here with the Butler B tract, as I understand it."

27. The staff asserts, additionally, that there is no record in the Commission's files of an application for abandonment of the service obligation.

28. Although United has not heretofore claimed Butler A gas as being dedicated to it in interstate commerce under in [*sic*] 1953 Gas Purchase Contract, we are satisfied that it would be in the public interest to explore this previously unlitigated issue raised by the staff, particularly in the light of the unitization of portions of the Butler A and B leases and the attempted dissolution of those units. If for example, natural gas underlying the Butler A tract is ultimately found to have been dedicated to United in interstate commerce to the same extent as the natural gas underlying the Butler B tract, then United would be entitled under the Natural Gas Act to receive all of the gas produced from those two tracts, and the issues pertaining to the attempted dissolution of the units would become moot.

29. We are, therefore, dividing this proceeding into Phase I to consider the possible dedication of Butler A gas, including the scope of that dedication, if any, and Phase II to consider all of the remaining issues herein,

including the merits of the settlement proposal or offer, as the case may be, and the issues on remand. Because Phase I may be determinative of much of Phase II and could result in our ordering the McCombs Group to deliver Butler A gas to United, we ask Judge Howe to schedule and decide Phase I on on expedited basis. Among other matters in Phase I, we would expect that a copy of the 1948 lease of the Butler A tract would be introduced into evidence and, on the assumption that the parties rely on Bee Quin's applications in Docket Nos. G-2997 and G-2998 to establish the scope of her dedications of Butler A gas, if any, that the evidentiary defects discussed in Opinion No. 740 will be cured.

30. All of the present respondents shall be the respondents in both Phase I and II, except National Exploration Company which has no apparent interest in the Butler A lease and, therefore, will continue as a respondent in Phase II only.[6] In view of the formation in 1974 of a Texas corporation called Bill Forney, Inc., and the assignment to it of many of respondent Bill Forney's interests, the staff should consider appropriate action toward naming that corporation and possibly its stockholders as respondents in both phases.[7] And to make sure that any other interested persons are given an opportunity to intervene and participate in Phase I the Secretary should prepare and cause to be published notice of this opinion and order establishing Phase I to litigate the possible dedication to interstate commerce of the natural gas underlying the Butler A tract.

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[6] Nonetheless, National Exploration Company should be allowed to participate in Phase I, if it so chooses, in connection with the evidentiary defects pertaining to Bee Quin's certificate applications.

[7] Apparently Bill Forney should remain a respondent because of his personal involvement, but consideration should be given to redesignating his name as Bill Forney, Sr.

MOTION FOR EMERGENCY RELIEF PENDENTE LITE

31. On September 24, 1975, the McCombs Group filed a motion pursuant to § 1.12 of our Rules of Practice and Procedure asking for "emergency relief *pendente lite* in order to preserve the leases covering certain wells committed to the settlement proposal pending herein."

32. The McCombs Group asserts, among other matters, that the settlement proposal before Judge Howe contemplates that the McCombs Group will sell and deliver to United the natural gas which is produced from five wells, including the Basin Petroleum Corporation No. 1 Marie Fruge Well (the Fruge Well), N.W. Chalkley Field, Calcasieu Parish, Louisiana, and the Bill Forney No. 1 Wychopen Well (the Wychopen Well), unnamed field, Wharton County, Texas; that the reserves underlying the two wells constitute 82.1% of the reserves which are offered in settlement; that neither well is being operated currently and, consequently, the oil and gas leases covering those wells are in danger of expiration for failure to produce; and that the McCombs Group is attempting to keep the underlying leases in force through shut-in royalty payments.

33. The McCombs Group asserts, additionally, that in the case of the Fruge Well, the underlying leases authorize such payments until April 1977 under circumstances when the operator is "unable to produce . . . because of lack of market or marketing facilities or Governmental restrictions". If we understand the McCombs Group correctly, it is uncertain as to whether such legal circumstances exist in fact and therefore it would prefer to preserve the underlying leases in a more certain manner by recommencing production and selling and delivering the natural gas to United. In the case of the Wychopen Well, the period of shut-in royalty payments apparently expired on August 3, 1975, and therefore the McCombs Group is in more grave danger of losing the underlying lease. Finally, the McCombs Group asserts that it is willing to sell and deliver the gas produced

from the underlying leases to United pending resolution of the issues in this proceeding on the condition that it receives credit for the volumes so delivered and, if the settlement proposal is not approved, if "the producers involved may thereupon abandon sales to United from these leases".

34. United, on September 24, 1975, filed a response indicating that it has a critical need for additional gas supplies and that the McCombs Group may have a limited ability to sell and deliver to it the volumes specified by Ordering Paragraph (B) of Opinion No. 740. "Therefore, United believes that the public interest may be served by a Commission order permitting United to receive such volumes as will be available from this acreage, pending final resolution of all of the issues involved herein."

35. In its answer filed October 3, 1975, the staff supports the motion to the extent that it would result in the commencement of deliveries of natural gas to United at an early date and asserts, in effect, that abandonment should be tied to the resolution of the respondents' obligations rather than the decision on the settlement. Additionally, the staff suggests a rate under Opinion No. 742, supra, subject to refund.

36. Although we favor the McCombs Group's proposal to begin selling and delivering natural gas to United from the Fruge and Wychopen Wells, we believe that such sales and deliveries should be based on the following principles: (1) The McCombs Group will receive volumetric credits against its natural gas obligations as ultimately decided or settled in this proceeding, and United will receive monetary credits against its payment obligations as ultimately decided or settled herein. (2) Subject to refund, United will pay for the natural gas which it receives from the Fruge and Wychopen Wells at a rate which is within the parameters of Section 157.40 of the Commission's Regulations Under the Natural Gas [*sic*] as presently amended by Opinion No. 742 issued August 28, 1975, and as amended

from time to time. (3) The McCombs Group will be authorized to abandon its sales and deliveries to United from the Fruge and Wychopen Wells upon satisfaction of its natural gas obligations as ultimately decided or settled in this proceeding.

37. Since the foregoing principles differ from those proposed by the McCombs Group and, in any event, since United has withdrawn its support of the settlement proposal insofar as the McCombs Group is concerned, we believe that we do not have a specific proposal before us for approval. Accordingly, we will neither grant nor deny the McCombs Group's motion for emergency relief *pendente lite*. The McCombs Group, United and the staff seem to be in substantial accord with respect to sales from the Fruge and Wychopen Wells in partial satisfaction of the McCombs Group's obligations to United and, therefore, we urge them to come to an agreement embracing the foregoing principles and to submit it by consent motion for our approval.

APPEAL OF ADMINISTRATIVE LAW JUDGE'S ORDER

38. On September 25, 1975, the McCombs Group filed an appeal pursuant to § 1.28(a) of our Rules of Practice and Procedure [a] asking us to modify Judge Howe's Order With Respect to Testimony and Production of Data issued September 15, 1975. The appeal is not well taken since the McCombs Group does not allege any "extraordinary circumstances where prompt decision by the Commission is necessary to prevent detriment to the public interest" as required by § 1.28(a).

39. Even turning to the McCombs Group's specific complaints, which we are not obliged to do under the circum-

[a] Although the filing recites that it is filed pursuant to § 1.7(d) of our Rules of Practice and Procedure, we find that that is an incorrect section for the filing in question.

stance, we are unable to find any such extraordinary circumstances. If some of the data to be produced by the McCombs Group embraces dedicated reserves which are not available to United's system, there is no showing that that fact has been explained to Judge Howe and that he has been given an opportunity to reconsider his order. Furthermore, we do not read into Judge Howe's order any requirement to produce individual financial statements, and we see nothing unreasonable in requiring the production of data pertaining to recent, current and future exploration and development expenditures, together with the results of recent and current expenditures. Since the settlement proposal or offer includes an agreement by the McCombs Group to spend not less than $500,000 in the exploration of additional reserves for United, Judge Howe may wish to have record evidence of the respective financial and natural gas resources of the members of the McCombs Group in connection with his determination as to whether or not the settlement proposal or offer is in the public interest.

United's Protest

40. On October 8, 1975, United filed a protest of the McComb's Group's alleged response to Ordering Paragraph (C) of Opinion No. 740 and a motion for an order directing the McCombs Group to comply immediately with that provision. The McCombs Group and du Pont, in an answer filed October 16, 1975, claim that the former has "fully complied" with that provision.

41. Upon reviewing United's protest and the McCombs Group's alleged lack of compliance together with the McCombs Group's and du Pont's answer, we find that part of the dispute between them arises from the McCombs Group's attempted retroactive dissolution of McCombs-Butler Gas Unit Nos. 1 and 2 which, tentatively, will not be recognized for the purpose of the Natural Gas Act, and that part arises from the McCombs Group's reliance upon

the settlement proposal, from which United subsequently withdrew its support, as satisfying a plan to carry out Ordering Paragraph (B) of Opinion No. 740 and the evidence to support that plan. We will, therefore, modify Ordering Paragraph (C) of Opinion No. 740 with a view toward obviating this dispute and giving Judge Howe explicit authority to take appropriate action to assure compliance with that provision.[9] Accordingly, we will deny United's motion without prejudice.

Motion for Reconsideration

42. On October 14, 1975, the McCombs Group and du Pont filed a motion asking us to reconsider the Order Granting Rehearing for Further Consideration and Limited Stay issued September 18, 1975, and, upon reconsideration, to approve the pending settlement proposal. Much of their motion is, in effect, a response to United's answer filed October 3, 1975, to their application for rehearing, and, as such, it is an unauthorized filing and need not be considered to that extent. Furthermore, their motion is based on the incorrect premise that our order issued September 18, 1975, "granted rehearing for [the] purpose of further consideration of the settlement proposal." The McCombs Group and du Pont had alleged, among other matters in their application for rehearing, that we erred in Opinion No. 740 in failing to consider the pending settlement proposal, and we granted rehearing on September 15, 1975, to consider that alleged error, among others. But consideration of that alleged error does not involve the same issues as consideration of whether or not to approve

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[9] The McCombs Group and du Pont assert in their answer that the former, on October 9, 1975, transmitted certain data covered by Ordering Paragraph (C) to the Commission staff pursuant to the staff's data request. We do not regard that transmission of information to the staff as compliance with Ordering Paragraph (C) unless that information was also *filed* of record as required by that provision.

the settlement proposal. Contrary to the McCombs Group's and du Pont's assertion in their motion for reconsideration that "a full factual record was developed in support of the settlement" on August 28 and 29, 1975, we believe, for the reasons hereinabove discussed, that the total record developed in this proceeding before Judges Levy and Howe is not yet ripe for the purpose of considering the merits of the settlement proposal or offer, as the case may be. And we believe that Phase I of this proceeding, which considers questions pertaining to the possible dedication of the natural gas underlying the Butler A tract, may well affect the decision in Phase II of whether the McCombs Group's and du Pont's proposal is in the public interest. We will, therefore, deny the McCombs Group's and du Pont's motion for reconsideration.[10]

The Commission further finds:

(1) The assignments of error and grounds for rehearing set forth in the McCombs Group's and du Pont's application for rehearing and motion for stay present no facts or legal principles which would warrant any change in or modification of Opinion No. 740 and order issued August 20, 1975, except as that Opinion and order is modified and clarified herein.

(2) In the light of developments, the McCombs Group's motion for emergency relief *pendente lite* does not present a specific proposal for which relief can be granted.

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[10] In a response filed October 28, 1975, United argues that under the "Limited Cross Conveyance Deed" filed as Appendix B to the McCombs Group's and du Pont's motion for reconsideration "each of the royalty and overriding royalty owners will continue to share in production from the Butler A and Butler B leases in the same percentage as they shared in such production prior to the so-called 'Dissolution of Units.'" Its consequent argument that we should give effect to substance over form and not recognize the attempted dissolution of the units for the purpose of the Natural Gas Act is properly addressed to Judge Howe.

The Commission orders:

(A) Ordering Paragraph (A) of Opinion No. 740 and order issued August 20, 1975, is modified to read as follows:

"(A) Billy J. McCombs, R. James Stillings d/b/a Gastill Company, David A. Onsgard, Basin Petroleum Corporation, Louis H. Haring, Jr., National Exploration Company and Bill Forney, all of whom are respondents herein and holders of small producer certificates of public convenience and necessity, shall sell and deliver to United Gas Pipe Line Company in interstate commerce in compliance with the Commission's certificate in Docket No. G-12694, not less than (1) 42.9658% of the natural gas produced from the Butler A tract and the east 113 acres of the Butler B tract below a depth of 6,500 feet and above a depth of 8,640 feet, (2) 52.0767% of the natural gas produced from the Butler A and B tracts below a depth of 8,700 feet and above a depth of 9,700 feet and (3) 14.2045% of the natural gas produced from the unnamed gas unit embracing the west 50 acres of the Butler B tract from a depth of 4,115 feet to a depth of 8,700 feet, all of said sales and deliveries to commence 15 days after the date of this opinion and order on rehearing, or as soon thereafter as United Gas Pipe Line Company physically connects gathering facilities to receive the gas, at interim rates subject to refund which are equal to the maximum rates applicable to holders of small producer certificates of public convenience and necessity under Section 157.40 of the Commission's Regulations Under the Natural Gas Act as presently amended by Opinion No. 742 issued August 28, 1975, and as amended from time to time."

(B) Ordering Paragraph (C) of Opinion No. 740 and order issued August 20, 1975, is modified to read as follows:

"(C) The record of this proceeding is reopened and the said respondents shall file within 15 days after the date of this opinion and order on rehearing, or within such longer period of time as may be determined by an admini-

strative law judge (1) data commencing in 1971 showing the volumes of natural gas which were produced from each well in the Butler A and B tracts, identifying the respective wells and tracts, to and including October 21, 1974, and, separately, to a recent specified date (which shall be made current as determined by an administrative law judge from time to time), including the evidence specified in paragraph 65 of Opinion No. 740, and also showing the respective amounts delivered to United Gas Pipe Line Company and the respective amounts delivered to others, naming them; (2) a plan or plans to carry out Ordering Paragraph (B) of Opinion No. 740 separate and apart from any proposal or offer to settle the proceeding generally, (3) their evidence to support such plan or plans and (4) copies of contracts establishing a rate or rates for the sales specified in Ordering Paragraphs (A) and (B) of Opinion No. 740, as the former is modified herein, within the parameters of Section 157.40 of the Commission's Regulations Under the Natural Gas Act as presently amended by Opinion No. 742 issued August 28, 1975, and as amended from time to time, or, if agreement within those parameters is not reached, such other filings selected by them (separate and apart from any proposal or offer to settle the proceeding generally) to establish a rate or rates for the said sales including possibly an application or applications under Section 154.92(d) of the Commission's Regulations Under the Natural Gas Act for a successor certificate or certificates which would affect a termination of the certificate in Docket No. G-12694 and establish a rate or rates for the said sales, in any case, together with their evidence to support the said rate or rates. The presiding administrative law judge is authorized to take appropriate action to assure compliance with this paragraph."

(C) The application for rehearing of Opinion No. 740 filed by Billy J. McCombs, R. James Stillings d/b/a Gasstill Company, David A. Onsgard, Basin Petroleum Corporation, Bill Forney and E.I. du Pont de Nemours & Company on September 11, 1975, is denied.

(D) The stay of the commencement of the sale and deliveries of natural gas pursuant to Ordering Paragraph (C) of the Commission's order issued herein on September 18, 1975, is hereby dissolved as of the date specified in Ordering Paragraph (A) of this Opinion No. 740-A on rehearing.

(E) This proceeding is divided into Phase I which shall consider all questions pertaining to whether or not the natural gas underlying the Butler A tract is dedicated to United Gas Pipe Line Company in interstate commerce and, if so, the extent of such dedication, and Phase II which shall consider all of the remaining questions in this proceeding. Public notice of this action affecting the Butler A tract shall be given and published forthwith.

(F) The appeal of the presiding administrative law judge's order with respect to testimony and the production of data filed by Billy J. McCombs, R. James Stillings d/b/a Gastill Company, David A. Onsgard, Basin Petroleum Corporation and Bill Forney on September 25, 1975, is denied.

(G) The motion filed by United Gas Pipe Line Company for an order directing Billy J. McCombs, R. James Stillings d/b/a Gastill Company, David A. Onsgard, Basin Petroleum Corporation and Bill Forney to comply immediately with Ordering Paragraph (C) of Opinion No. 740, is denied without prejudice.

(H) The motion for reconsideration filed by Billy J. McCombs, R. James Stillings d/b/a Gastill Company, David A. Onsgard, Basin Petroleum Corporation, Bill Forney and E.I. du Pont de Nemours & Company on October 14, 1975, is denied.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

(CAPTION OMITTED IN PRINTING)

OPINION NO. 740-B

Opinion and Order Denying Rehearing

(Issued January 19, 1976)

1. On December 8, 1975, United Gas Pipe Line Company (United) filed an application pursuant to Section 19(a) of the Natural Gas Act and § 1.34 of our Rules of Practice and Procedure asking us to grant rehearing of Opinion No. 740-A [1] issued November 7, 1975, to the extent necessary to eliminate from consideration in Phase II of the remanded proceeding (1) questions pertaining to the reasons for the McCombs Group's [2] attempted dissolution of McCombs-Butler Gas Unit Nos. 1 and 2 and (2) the question of whether or not the McCombs Group's settlement proposal, which was initially supported and later rejected by United, is in the public interest. At the threshold, we will accept United's explanation that although applications for rehearing of opinions on rehearing are ordinarily inappropriate, such an application is appropriate in this instance because the issues raised by United were first addressed by us in Opinion No. 740-A on rehearing.

2. Referring to our statement in paragraph 19 of Opinion No. 740-A that the significant economic fact appears to be that the dissolution of McCombs-Butler Gas Unit

[1] Entitled "Opinion and Order Denying Rehearing, Modifying Ordering Provisions, Dissolving Stay, Noticing Phasing of Proceeding, Acting on Emergency Relief, Denying Appeal, Denying Without Prejudice Compliance Order and Denying Reconsideration."

[2] Respondents Billy J. McCombs, R. James Stillings d/b/a Gastill Company, David A. Onsgard, Basin Petroleum Corporation and Bill Forney.

Nos. 1 and 2 was motivated by the possibility that the Federal Power Commission might order the members of the McCombs Group to deliver to United the gas which they are producing from the Butler A lease and selling to respondent E.I. du Pont de Nemours & Company (du Pont) at a current price of $1.04 per Mcf, subject to a Btu adjustment, United asserts in its application (footnote omitted),

> "United fully supports this finding and believes that no other conclusion could have been reached on the record before the Commission. Yet, the Commission went on to state [in paragraph 21] that 'the record may be incomplete with respect to the reason(s) for the attempted dissolution of the units' and directed consideration in Phase II of 'whether there were bona fide other reasons for dissolving' the units. United believes that in so doing the Commission committed error.
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> "The record before the Commission unequivocally shows that the *only* reason for the McCombs Group's attempt to dissolve the Butler Unit Nos. 1 and 2 was the understandable fear that the Commission would require delivery of Butler A gas to United as a result of its unitization with the Butler B tract.
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> "[T]he Commission should find, as the record shows, the attempted dissolution was merely a 'sham' undertaken in an effort to defeat Commission jurisdiction."

3. We concur with United that no other conclusion could have been reached on the basis of the record which was before us when we decided Opinion No. 740-A. But, as noted in that opinion and order, the evidence pertaining to the attempted dissolution of the units was admitted and developed as part of the record on August 28 and 29, 1975, and the record as developed on those dates is only part of the overall record to be developed pursuant to our order of June 17, 1975, setting the proposed settlement to hearing, and Opinion No. 740. Furthermore, the record as

developed on August 28 and 29, 1975, was not certified to us by Presiding Administrative Law Judge Thomas L. Howe at the conclusion of some particular facet of this proceeding; instead, it was brought to our official attention by the McCombs Group and du Pont, *during the course of the presentation and testing of evidence,* as an appendix to their application for rehearing of Opinion No. 740. And while we noted in paragraph 15 of Opinion No. 740-A that witness Bill Forney, Jr. (son of respondent Bill Forney) testified that it was fair to say that the paramount reason for dissolving the units was the possibility that the Federal Power Commission might direct delivery of reserves produced from the Butler A lease to United, we also noted in paragraph 13 that during the course of the hearing on August 28 and 29, 1975, there were allegations of surprise and insufficient time to prepare for cross-examination, and Judge Howe had ruled that he would allow further cross-examination when the hearing resumed. Further cross-examination could have led to further re-direct examination and, consequently, to a modification of witness Forney's testimony or the presentation of other witnesses who might have nullified or refuted his testimony. In summary, we reject United's contention that we erred, because the record which was before us when we decided Opinion No. 740-A was in the process of development and we could not have known at that time what other possible evidence on the dissolution question might have shown.

4. United argues, additionally, that "counsel for the McCombs Group has informed the Presiding Judge and the parties to this proceeding [presumably subsequent to the issuance of Opinion No. 740-A] that the McCombs Group does not intend to put in *any* additional evidence with respect to the reasons for the attempted dissolution." If that is so, and in the absence of countervailing information we do not question the veracity of United's statement, then such information is not yet officially before us and

cannot form the basis for an error in Opinion No. 740-A. Other than United's claims that the outcome of the dissolution issue is certain and that that issue "will merely complicate further proceedings", United advances no reason why we should not permit Judge Howe to decide that issue as part of his overall decision of Phase II of this proceeding.[3] In the absence of any such cogent reasons we choose not to take measures to bring that information before us officially as we believe that the piecemeal decision of issues in this proceeding would serve to hinder rather than advance the administrative process.

5. In Opinion No. 740-A we said that the dissolution of McCombs-Butler Gas Unit Nos. 1 and 2 does not require our abandonment authorization under Section 7(b) of the Natural Gas Act. Upon further consideration, we now believe that it does and that unless and until such authorization is given, the attempted dissolution of those natural gas producing units should not be recognized for the purpose of the Natural Gas Act.

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[3] In *McCombs, et al.* v. *Federal Power Commission,* No. 75-1829 filed November 14, 1975, the United States Court of Appeals for the Tenth Circuit has issued a stay of Ordering Paragraph (A) of Opinion No. 740-A directing the delivery of natural gas to United. We suspect that United's unstated reason for seeking rehearing on the dissolution issue is to obtain a firm Commission ruling, or at least stronger Commission statements, on that issue prior to the Tenth Circuit's consideration of this matter on the merits. In this respect, and as discussed in connection with the settlement proposal issue, infra, United's request seems to be in the nature of a motion to reach a different result on the dissolution issue on the basis of something which occurred after we decided and issued Opinion No. 740-A. It would be inappropriate to grant the relief which United requests without giving the members of the McCombs Group and the other participants an opportunity to respond in the nature of an answer to a motion under § 1.12(c) of our Rules of Practice and Procedure or in the nature of an answer to an application for rehearing after granting rehearing for further consideration under § 1.34(d) thereof.

6. The Commission found in Opinion No. 740 that the certificate in Docket No. G-12694 under which United is entitled to the natural gas involved in this proceeding is broad enough to cover both (1) the gas which is produced from wells on the Butler B lease, and (2) a proportionate part of the gas which is produced from wells on units which include any part of the Butler B lease. When a unit embracing the Butler B lease, or a part of the Butler B lease, is formed, a proportionate part of the reserves underlying the Butler B lease is withdrawn from interstate commerce, but such withdrawn reserves are offset, in whole or in part, by the proportionate parts of the reserves underlying the other leaseholds within the unit. Similarly, when such a unit is dissolved the proportionate parts of the reserves underlying the other leaseholds within the unit are withdrawn from interstate commerce, but such withdrawn reserves are offset, in whole or in part, by the proportionate part of the reserves underlying the Butler B lease. In Opinion No. 740-A we focused on the foregoing withdrawals of reserves from interstate commerce and said, in effect, that because of the offsetting additions to interstate commerce such withdrawals should not require Section 7(b) abandonment authorization.[4]

7. We continue to adhere to our position that the withdrawal of reserves from interstate commerce incident to the formation or dissolution of McCombs-Butler Gas Unit Nos. 1 and 2 does not require our abandonment authorization, at least to the extent that the formation or dissolu-

[4] Utilizing the example in Opinion No. 740-A, and assuming that the surface boundaries of Whiteacre (dedicated) and Blackacre (not dedicated) are identical percentagewise to the subsurface limits of the underlying natural gas reservoirs, United would appear to be entitled to the same amount of gas from the same reservoirs whether it is entitled to receive 100% of the gas from 25% of the reservoirs (prior to the formation of the Grayacre unit, or after its dissolution), or 25% of the gas from 100% of the reservoirs (during the existence of the Grayacre unit).

tion of those units represents nothing more than a realignment of entitlement percentages applicable to reservoirs underlying both the Butler A and Butler B leases, with no loss to United of entitlement volumes (as in the footnote to the preceding paragraph). In that case, there would be no net withdrawal of reserves from interstate commerce requiring Section 7(b) abandonment authorization on that basis. *The Tarpon Oil Corporation, et al.*, Docket Nos. CI60-582, *et al.*, 26 FPC 635, 639 (1961). Even if such authorization should be required, we could rationalize that since the same strata of the same acreage cannot be embraced within a unit, and not embraced within a unit, at the same time, and since the certificate in Docket No. G-12694 covers both situations, it is reasonable to assume that limited pre-granted abandonment authorization is implicit in that certificate to enable the formation and dissolution of units. And the limit would be the dividing point at which there are no net withdrawals of reserves from interstate commerce.

8. But where the formation and dissolution of natural gas producing units brings about a net withdrawal of dedicated reserves from interstate commerce, then Section 7(b) abandonment authorization is required.[5] An exact percentage matching of leasehold boundaries with reservoir boundaries (as in the footnote to the second preceding paragraph) would rarely, if ever, occur. When leaseholds which are dedicated to interstate commerce are unitized with leaseholds which are not so dedicated, the underlying dedicated reserves will thereby be withdrawn from interstate

[5] Where, for example, a given reservoir underlies some, but not all, of the leaseholds within a unit, there would seem to be a net withdrawal of reserves from interstate commerce incident to its formation or dissolution, and not merely a realignment of entitlement percentages to reservoirs underlying all of the leaseholds within the unit, even if the withdrawn reserves are fully offset by the addition of other reserves incident to the formation or dissolution of the unit.

commerce to the extent that the areal percentage of those reserves within the unit exceeds the areal percentage of the dedicated leaseholds within the unit. Utilizing the Opinion No. 740-A example in which Whiteacre, which is dedicated, is one-third the size of Blackacre, which is not dedicated, and assuming that 40% of the reserves underlying both leaseholds underlie Whiteacre, then the formation of the Grayacre unit would cause Whiteacre's entitlement to decline from 100% of the (Whiteacre) production which, in turn would embrace 40% of the reservoirs, to 25% of the (combined Whiteacre and Blackacre) production which, in turn, would embrace 100% of the reservoirs. In other words, the formation of the Grayacre unit would effect a net withdrawal of 15% of the combined underlying reserves from interstate commerce. And by gerrymandering leasehold boundaries, the formation of natural gas producing units could be used as a vehicle for depriving interstate commerce of dedicated natural gas reserves.

9. But reservoir entitlements tell only one side of the story. The other side is production. In the example in the preceding paragraph, dissolution of the Grayacre unit would effect a net gain of 15% of the combined underlying reserves for interstate commerce. But if all of the current production, or a substantial part of the current production, is from Blackacre, the nondedicated leasehold, the dissolution of the Grayacre unit would result in drainage, or net drainage, of the reserves underlying Whiteacre, the dedicated leasehold. The dissolution of a natural gas producing unit under such circumstances could also be used as a vehicle for depriving interstate commerce of dedicated natural gas reserves.

10. Because both the formation and dissolution of natural gas producing units can be used as vehicles for withdrawing dedicated natural gas reserves from interstate commerce, we are now of the view that Section 7(b) abandonment authorization should be and is required whenever the formation or dissolution of such a unit would

result in a net withdrawal of such reserves from interstate commerce. And because of the interacting complexities of current production and underlying reserves, we would measure such a net withdrawal of reserves for the purpose of Section 7(b) in terms of current production, underlying reserves or any other rational standard. In other words, we want to take a look at the formation or dissolution of a natural gas producing unit if a net withdrawal of reserves from interstate commerce can be demonstrated in terms of current production, underlying reserves or any other rational standard.[6]

11. We will not complicate this proceeding by ordering the members of the McCombs Group to show cause why they should not be required to file an application under Section 7(b) of the Natural Gas Act before we recognize the attempted dissolution of McCombs-Butler Gas Unit Nos. 1 and 2 for the purpose of the Act. Suffice it to say that we are satisfied that so much of the record as is before us, particularly the testimony of witness Bill Forney, Jr., amply demonstrates that dedicated natural gas reserves would be withdrawn from interstate commerce, at least under the production standard discussed in the second preceding paragraph, and, as a result, the record makes a prima facie showing that such an application is a necessary prerequisite for our recognition of the attempted dissolution of those units for the purpose of the Natural Gas Act. While we did not err, as United contends, in failing to make a firmer ruling with respect to the reason(s) for the attempted dissolution of McCombs-Butler Gas Unit Nos. 1 and 2, we now decline to recognize the attempted dissolution of those units for the purpose of the

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[6] While it is the obligation of the person or entity forming or dissolving the unit to file a Section 7(b) abandonment application, there may be situations in which they may disclaim that there would be a net reduction of reserves under any standard. In such a case, we will ordinarily entertain a complaint to determine that fact.

Natural Gas Act for the additional reason, and until such time, as an abandonment application under Section 7(b) is filed and the statutory determinations permitting or denying abandonment are made.

12. As a second ground for rehearing, United urges that we should reject the McCombs Group's settlement proposal as being contrary to the public interest and, consequently, eliminate that proposal from consideration in Phase II of this proceeding. United's argument, in this connection, is largely repetitive of its position set out in several of its filings considered in connection with the various facets of Opinion No. 740-A in which we decided to permit the settlement proposal to be considered on its merits as an alternative to the disposition of this proceeding set out in Opinion No. 740 and modified in Opinion No. 740-A.[7] But United adds in its application for rehearing of Opinion No. 740-A:

> "[T]he McCombs Group has placed into the record every bit of information with respect to reserves that it intends to adduce. This was made clear at the prehearing conference held November 24, 1975, at which time counsel for the McCombs Group indicated that the McCombs Group would not present any additional reasons or evidence in support of the offer of settlement."

13. Again, United claims that we erred as a result of something which occurred after we decided and issued Opinion No. 740-A, which seems to us to be a legal impossibility. United appears to be asking us, in effect, to reach a different result on the basis of later information, which request seems to be in the nature of a motion which is neither supported by the later information[8] nor cast in

[7] *Michigan Consolidated Gas Company* v. *Federal Power Commission*, 238 F.2d 204, cert. den. 364 U.S. 913 (1960).

[8] The record of the prehearing conference held November 24, 1975, has not been brought to our official attention.

such a manner as to permit a fair opportunity to respond.[9] In any event, as previously indicated in Opinion No. 740-A, we continue to believe that we are proceeding properly under *Michigan Consolidated*, supra, to consider the settlement proposal on its merits, and we reject United's contention that we erred because the record which was before us when we decided Opinion No. 740-A was subsequently limited by the McCombs Group's decision, asserted by United, not to offer additional supporting evidence.

14. On December 23, 1975, the McCombs Group and du Pont filed a response to United's application urging that it be treated as a motion for reconsideration, that their response be treated as an answer to United's motion under § 1.12(c) of our Rules of Practice and Procedure and, finally, that United's motion be denied. Notwithstanding the course of action advocated by them, we are treating United's filing as an application for rehearing and, consequently, we are not considering the merits of the McCombs Group's and du Pont's response since it is not an authorized filing in the absence of our granting rehearing under § 1.34(d) of our Rules of Practice and Procedure. And while we reach the same result on the merits of United's application as is advocated by the McCombs Group and du Pont, we note that those respondents have apparently reached the point at which they have no substantial new arguments.

The Commission further finds:

The assignments of error and grounds for rehearing set forth in United Gas Pipe Line Company's application for

[9] While § 1.12(c) of our Rules of Practice and Procedure authorizes answers to motions, § 1.34(d) expressly prohibits answers to applications for rehearing. As a result, a request which is properly the subject of a motion and which is cast in the form of an application for rehearing could mislead a litigant with respect to his right to respond.

rehearing filed December 8, 1975, present no facts or legal principles which would warrant any change in or modification of Opinion No. 740-A and order issued November 7, 1975, except as that Opinion and order is clarified herein.

The Commission orders:

The application for rehearing of Opinion No. 740-A filed by United Gas Pipe Line Company on December 8, 1975, is denied.

By the Commission.

(SEAL)

Mary Kidd Peak,
Acting Secretary.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 75-1829

BILLY J. MCCOMBS, R. JAMES STILLINGS, d/b/a GASTILL COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM CORPORATION, E.I. DU PONT DE NEMOURS & COMPANY, and BILL FORNEY,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent,

UNITED GAS PIPE LINE COMPANY,

Intervenor.

On Petition for Review of Orders of the Federal Power Commission

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(October 18, 1976)

Before HILL and SETH, Circuit Judges and TEMPLAR, Senior District Judge.*

SETH, Circuit Judge: This is a proceeding to review Opinions Nos. 740, 740-A, and 740-B of the Federal Power Commission entered in its docket No. CP74-94. The orders were stayed by this court on December 9, 1975.

The issues on this review concern two sections of the Natural Gas Act, Sections 7(b) and 7(c) [15 U.S.C. §§ 717f (f) and 717f(c)]. The Commission found that the petitioners had violated the Act by failing to deliver gas to United Gas Pipe Line Company. The petitioners' contention that there was an abandonment under Section 7(b) was thus found to be without merit by the Commission.

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* Of the District of Kansas, Sitting by Designation.

The factual background must be described at some length. In May 1948, B. C. Butler, Sr. et al. executed an oil and gas lease to W. R. Quin (the Butler B lease) covering approximately 163 acres (the Butler B tract) in Karnes County, Texas.

Under a Gas Purchase Contract dated April 29, 1953 (the 1953 Gas Purchase Contract), the leaseholders agreed to sell and deliver to United Gas Pipe Line Company "merchantable natural gas . . . produced from all wells now or hereafter drilled" on the Butler B tract plus "seller's proportionate part of all merchantable natural gas produced from any well or wells located on any unit or units" which include any portion of the Butler B tract.

Following the *Phillips* decision, Quin filed application with the Federal Power Commission for producer certificates. On December 8, 1954, the Commission issued certificates to Quin authorizing the sale, and continued sale, of the natural gas in interstate commerce. The lease was transferred several times.

The Butler B lease was eventutlly assigned to H. A. Pagenkopf. On June 19, 1963, the Commission ordered termination of the 1954 certificates and issued a new certificate in Docket No. G-12694 authorizing Pagenkopf to continue the service which had been initiated by Quin.

In 1966, Pagenkopf assigned the lease to L. H. Haring, Jr., who, in turn, engaged Bay Rock Corporation as operator. Haring notified United of the assignment, stating that he would make appropriate filings with the Commission reflecting the change in ownership. He never made such filings. At the time of the Pagenkopf-Haring assignment, there was one well on the Butler B tract, the Butler No. 7 Gas Well, which was completed at approximately 2,900 feet, but was not then producing. Haring unsuccessfully attempted to establish production from the well, but all production ceased on May 28, 1966. On December 5, 1966, Haring and Bay Rock notified United that the well was depleted and no more gas was available "at this time."

United acknowledged the depletion and removed its equipment but advised that it would reinstall its equipment whenever Bay Rock might have further gas to deliver under the contract. Bay Rock did not seek or obtain Commission authorization to abandon its sale to United.

Nothing further occurred with the Butler B tract until 1971 when Haring transferred his working interest rights in certain deep reservoirs in the acreage to National Exploration Company and the McCombs Group. On November 1, 1971, Haring assigned a working interest in the west 50 acres of the 163-acre Butler B tract from a depth of 4,115 feet to 8,700 feet to National Exploration pursuant to a prior agreement under which the 50-acre interest was unitized by National Exploration with its interest in 302 adjoining acres. National Exploration was unaware at the time of the assignment of United's interest in the Butler B tract. On October 22, 1971, the McCombs Group acquired a working interest in the remaining 113 acres of the Butler B tract between 6,500 feet and 8,653 feet. On November 1, 1971, the McCombs Group designated as the McCombs-Butler Gas Unit No. 1 their interests embracing the east 113 acres of the Butler B tract and the adjoining 150 acres of the Butler A tract at the levels noted. On April 1, 1972, the McCombs Group acquired from Haring a working interest in the entire 163-acre Butler B tract between the depths of 8,700 feet and 9,700 feet. On April 3, 1972, the Group designated as the McCombs-Butler Gas Unit No. 2 their interests embracing the 163-acre Butler B tract and the adjoining 150-acre Butler A tract at the levels noted.

The McCombs Group thereupon began drilling. Relying on a 1967 title opinion which failed to show United's possible interest in the Butler B lease, the Group in September 1971 drilled Butler No. 1 Well in the Butler A tract which produced gas from the McCombs-Butler Gas Unit No. 1. McCombs then contacted United, among others, to negotiate a sale of the gas. By letter dated November 19, 1971,

United inquired into the source of the Group's leases. While the record evidence is in conflict as to the details of these negotiations, they were ultimately discontinued. As noted above, the McCombs-Butler Gas Unit No. 1 was designated effective November 1, 1971, and a new title opinion dated December 7, 1971, disclosed United's interest in the Butler B lease.

In February 1972, the Group drilled the Butler No. 2 Well on the Butler A tract which produced gas at depths embraced by the McCombs-Butler Gas Units Nos. 1 and 2. Gas Unit No. 2 was designated on April 3, 1972, but a title opinion dated May 31, 1972, failed to disclose United's possible interest in the Butler B tract.

The McCombs Group had been continuing negotiations for sale of the production and in June 1972 E. I. du Pont de Nemours & Company agreed to purchase all of the gas underlying the Butler A and B tracts for industrial consumption in the intrastate market.

The Group continued drilling operations. In September 1972, the Butler No. 3 Well on the Butler B tract began producing gas at depths embraced by the McCombs-Butler Gas Unit No. 1. At the same time, the Butler Well No. 4 on the Butler A tract produced gas at levels embraced by the McCombs-Butler Gas Units Nos. 1 and 2.

In the meantime, early in 1972, National Exploration drilled two gas producing wells within its allocated depths on the west 50 acres of the Butler B tract. United sought to purchase the gas in April 1972. In the course of preparing the sale, National Exploration notified United that they believed the company's working interest in the 50 acres of the Butler B tract might be subject to United's 1953 Gas Purchase Contract. United thereupon undertook a title search relative to the Butler B tract and in late May 1973, learned of its interest. On June 6, 1973, United notified the McCombs Group of its claim under the 1953 contract.

The Group responded by filing a lawsuit in the District Court of Karnes County, Texas, seeking a declaratory judgment that the Quin-United contract did not entitle United to Butler B gas. The proceeding was removed to the United States District Court for the Western District of Texas where it is being held pending the outcome of these proceedings.

By subsequent agreement, National Exploration agreed to sell its portion of Butler B gas to United and it is no longer a party to the proceedings.

On October 9, 1973, United filed a complaint with the Federal Power Commission alleging that the McCombs Group was violating the Natural Gas Act and requesting the Commission to issue an order requiring the Group to show cause why they were not in violation of the Act. United also asked the Commission to order the Group to deliver to United volumes equivalent to those which had been diverted from the interstate market to du Pont. McCombs filed its Answer and a Motion to Dismiss or Defer the Action, in which it denied violating the Act and moved to dismiss the petitions, or to defer the proceedings pending the outcome of the court litigation which challenged the validity of the Quin-United contract.

On November 27, 1973, the Commission issued a show cause order (JA at 89-92) requiring the Group to appear at hearings and to show cause why they should not be held in violation of Section 7 of the Natural Gas Act; why they should not be required to file applications for certificates of public convenience and necessity as successors in interest; why they should not be required to deliver to United in compliance with the contract provisions volumes equivalent to those withheld from the interstate market; and why they should not be required to cease and desist from the sales then being made in the intrastate market.

On December 12, 1973, the Commission denied McCombs' motions to dismiss or defer the proceedings (JA at 93-95),

noting that the validity of the Quin-United contract was irrelevant to the Commission's determination of obligations under the Natural Gas Act.

Hearings commenced before an administrative law judge on January 10, 1974, and ended on February 14, 1974. On April 26, 1974, the presiding judge issued his initial decision (JA at 103-117). The judge concluded that "the service authorized and the gas supply dedicated by the certificates involved herein [Pagenkopf's successor producer certificate, FPC Docket No. G-12694] include any and all gas produced from the Butler B acreage" and, consequently, the unauthorized intrastate sale of that gas violated the Natural Gas Act. Additionally, he concluded that however negligent United may have been in asserting its rights, and however innocent McCombs may have been, the Group should be required to cease and desist from continuing the sales and to file applications under Section 7 for authority to make new sales. Finally, the judge held that the record was inadequate for determining the volumes attributable to the Butler B lease which were diverted and reserved all questions of appropriate remedy until McCombs filed applications for new certificates. Exceptions to the decision were filed by both parties.

On August 20, 1975, the Commission issued Opinion 740 (JA at 129-171), affirming the initial decision of the administrative law judge. The Commission held that Sections 7(b) and 7(c) of the Natural Gas Act, considered together, required the continuation of certificated service. Relying on that principle, it concluded that the certificate issued to Pagenkopf required the McCombs Group to sell Butler B gas to United.

On September 10, 1975, the McCombs Group filed an Application for Rehearing and a Motion to Stay (JA at 173-189). In response to the issues raised in the application for rehearing, the Commission issued Opinion 740-A on November 7, 1975 (JA at 232-250), which dealt with a settlement

proposal not here considered, and directed that evidence be taken as to it. On January 19, 1976, the Commission issued Opinion 740-B (JA at 252-261), which denied United's application for rehearing of Opinion 740-A. The Commission affirmed its earlier decision on the points raised preferring fuller development of the record. It also treated several other issues not here concerned. All three Opinions, 740, 740-A, and 740-B, are currently stayed by order of this court issued December 9, 1975. Evidentiary hearings before the administrative law judge continue in accordance with the Opinions.

Appellant McCombs raises several points on appeal, the most important of which is a challenge to the Commission's holding that abandonment authorization and recertification was necessary for sales of gas by McCombs in the Butler B tract.

Of these several issues raised on this appeal, we will only consider what appears to be the basic one, and that is the matter of abandonment.

To consider again some of the facts outlined above as they relate to this issue, the one producing gas well on the Butler B lease ceased producing early in 1966. The lease was assigned by Pagenkopf effective in March 1966, and the assignee, Haring, attempted to work over the well. During this work, about 3,000 Mcf was produced, but all production again ended in May 1966. The operator for Haring advised the gas purchaser, United, in December 1966 that the well was depleted. United thereafter in 1966 removed the equipment it had connected to the well. Thus, the only producing gas well was abandoned in the fall of 1966. The operator and the purchaser recognized that there could be no more gas delivered from the well. This was a physical fact beyond the control of either of them, and they recognized the realities of the situation. The operator or owner had tried to restore production but was unable to do so. The sellers and buyers wished to continue

the sale and purchase of gas but could not do so. The record does not show that any gas was ever produced thereafter from this original well. The witness Haring who was the owner who attempted the workover, and who was a petroleum geologist, testified:

> "Certainly I was not aware of the gas reserves at deeper levels when the gas production ceased in 1966, and, as far as I know, neither United nor anyone else was aware of its existence."

In August 1968, the FPC wrote a letter to Pagenkopf suggesting that he file an application for abandonment. By an undated letter the Commission made a similar suggestion to the operator for Pagenkopf's successor, Haring. The FPC thus twice recognized that there had been no production for an extended time, and recognized that the abandonment should be formalized for its records. This must be acknowledged as a recognition by the Commission that there was in fact an abandonment, but there was something needed for the record. The records of the FPC as to this matter have apparently been destroyed under its procedures; consequently, it is not known what they may have indicated as to abandonment. The Commission in Opinion No. 740 in footnote 2 states as to the original proceedings for certification: "Our records indicate that Docket Nos. G-2997 and G-2998 were destroyed in 1964." It is apparent however from the testimony that no operator or owner filed a formal application to abandon.

Thus we have a situation where there was an abandonment as a recognition of the indisputable physical facts beyond anyone's control. The Commission participated in this recognition as there were at least two suggestions by the Commission that someone file something to tidy up the records. These letters from the Commission must be taken, in view of the destruction of the supporting records, to be an acknowledgment that there was an abandonment. It is difficult to see how a formal application, and a decision by the Commission could have added anything to these letters. In these circumstances, we must hold that there was an abandonment which was recognized by the Commission, and its jurisdiction ended.

Thus we must hold as a matter of law that there was an abandonment sufficient under Section 7(b) of the Natural Gas Act. This being a matter of law, we do not consider it within the expertise of the Commission.

The "abandonment" we refer to is that contemplated under Section 7(b) of the Act, as above indicated. This is the only "abandonment" which is applicable to these circumstances. Section 7(b) refers to "service rendered," and the ordering of further "service" would have been a futile gesture. The seeking of an application by the Commission was a recognition of the fact that no more gas could be delivered from the only gas well, and that the "service rendered" had long since ceased contrary to everyone's wishes. This action by the Commission thus could only have reference to Section 7(b).

We have examined the relationship between service and certification insofar as the Court did in *Sun Oil Co. v. Federal Power Comm'n*, 364 U.S. 170, 80 S.Ct. 1388, 4 L.Ed.2d 1639; *Sunray Mid-Continent Oil Co. v. Federal Power Comm'n*, 364 U.S. 137, 80 S.Ct. 1392, 4 L.Ed.2d 1623; *United Gas Pipe Line Co. v. Federal Power Comm'n*, 385 U.S. 83, 87 S.Ct. 265, 17 L.Ed.2d 181, and in *Atlantic Refining Co. v. Public Service Comm'n*, 360 U.S. 378, 79 S.Ct. 1246, 3 L.Ed.2d 1312, and find no guidance as to the basic issue here presented. It is obvious from these decisions and from the Natural Gas Act that the Commission can and must prevent the termination of interstate service being rendered. This is no more than basic public utility doctrine, but when there is no service, and has been none for the several years here concerned by reason of depletion, there is no place for the application of the doctrine. The "service" is not the lease. *See Federal Power*

Comm'n v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 69 S.Ct. 1251, 93 L.Ed. 1499, and *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 85 S.Ct. 1517, 14 L.Ed.2d 466.

We stated in *Harper Oil Co. v. Federal Power Comm'n*, 284 F.2d 137 (10th Cir.), that:

> "It would thus seem clear that when once an independent producer of gas has dedicated his production to interstate commerce and thereby has come under the jurisdiction of the Commission, he remains thereunder so long as production continues. (Citing *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333)."

The determination of the abandonment issue is thus related to service and to production and not to leases. Again it would seem sufficient to rely upon the physical facts plus the recognition by the Commission of the realities of the situation.

It is also important to consider the statement of the Commission in Opinion No. 740 where it said:

> "And they are undoubtedly correct in their assertion that the purpose of Section 7(b) is to require the continuance of service once it has been commenced and the public has relied on it, and further, that Section 7(b) could not as a practicable matter have served that purpose when natural gas service from the Butler B tract was discontinued in 1966 . . ."

The Commission in this case has thus construed Section 7(b) abandonment to be in order when the only well delivering gas from the only known horizon has ceased to produce for an extended period by reason of depletion, and workover attempts have failed to restore production. The abandonment was thus a fact and the solicitation of

the producer to formalize it for the records is a sufficient indication that it was abandoned under Section 7(b).

All orders included in Opinions Nos. 740, 740-A, and 740-B are set aside, and the case is remanded with directions that other pending proceedings in FPC Docket No. CP74-94 based on such orders be terminated and the proceedings be dismissed.

IT IS SO ORDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

(Caption Omitted in Printing)

Order

MARCH TERM—MAY 2, 1977

Before LEWIS, Chief Judge, HILL, Senior Circuit Judge, and SETH, HOLLOWAY, MCWILLIAMS, BARRETT, and DOYLE, Circuit Judges.

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc presented by the respondent, Federal Power Commission, and intervenor, United Gas Pipe Line Company.

Upon consideration whereof, it is ordered that a rehearing in the captioned case is granted. The Court will advise the parties whether further briefing or oral argument is required at a later date.

The suggestion for rehearing en banc having been presented to the Court and no member of the panel nor judge in regular active service on the Court having requested that a vote be taken on the suggestion en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ HOWARD K. PHILLIPS
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

(Caption Omitted in Printing)

Order

SEPTEMBER TERM—OCTOBER 18, 1977

Before SETH and HILL, Circuit Judges, and TEMPLAR, Senior District Judge.

This matter comes on for further consideration of the order granting rehearing in the captioned appeal.

Upon consideration whereof, it is ordered:

1. The opinion filed October 18, 1976, is withdrawn.
2. The judgment entered October 18, 1976, is vacated.

/s/ HOWARD K. PHILLIPS
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 75-1829

BILLY J. MCCOMBS, R. JAMES STILLINGS, d/b/a GASTILL COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM CORPORATION, E. I. DU PONT DE NEMOURS & COMPANY, and BILL FORNEY,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, formerly known as FEDERAL POWER COMMISSION,

Respondent,

UNITED GAS PIPE LINE COMPANY,

Intervenor.

JANUARY TERM—FEBRUARY 9, 1978

Before SETH, HOLLOWAY and BARRETT, Circuit Judges.

Judgment

This cause came on to be heard on the record on appeal from the FERC and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of the FERC is reversed. The cause is remanded with directions that all orders included in the Commission's Opinions Nos. 740, 740-A, and 740-B be set aside. Further directions are issued that other pending proceedings in the Commission's Docket No. CP74-94 based on such orders be terminated and that the proceedings be dismissed.

William J. Holloway, Jr., Circuit Judge, dissented.

/s/ HOWARD K. PHILLIPS
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

(Caption Omitted in Printing)

Order

MARCH TERM—APRIL 6, 1978

Before SETH, HOLLOWAY, MCWILLIAMS, BARRETT, DOYLE, MCKAY, and LOGAN, Circuit Judges.

The Court, in order to correct a clerical error in the order entered April 4, 1978, in the captioned cause, hereby orders that the order of April 4, 1978, is vacated.

The order is reissued as of April 4, 1978, to read as follows:

This matter comes on for consideration of the respective petitions of Federal Energy Regulatory Commission and United Gas Pipe Line Company for rehearing and suggestions for rehearing en banc, and for consideration of United Gas Pipe Line Company's alternative request that the mandate be modified so that the Federal Energy Regulatory Commission may consider settlement agreements between United and persons who are not parties to the instant appeal.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judge Seth and Circuit Judge Barrett to whom the case was argued and submitted. Circuit Judge Holloway, also on the hearing panel and who dissented in the opinion filed February 9, 1978, voted to grant rehearing.

The rehearing having been denied by the hearing panel and no judge of the Court in regular active service on [*sic*] judge who was a member of the panel rendering the decision having requested a vote on such suggestion for

rehearing en banc, the suggestion for rehearing en banc is denied.

It is further ordered that United's alternative request that the mandate be modified so that the Federal Energy Regulatory Commission may consider settlement agreements between United and persons who are not parties to the instant appeal is also denied.

/s/ HOWARD K. PHILLIPS
Clerk

FPC Form 357
Rev (6-66)

ADDRESS ALL COMMUNICATIONS
TO THE SECRETARY

FEDERAL POWER COMMISSION
WASHINGTON, D. C. 20426

August 8, 1968

In reply refer to:
BNG-IP/GC
Docket No. G-12694
H.A. Pagenkopf
(Operator), *et al.*

H. A. Pagenkopf
1631 Milam Building
San Antonio, Texas 78205

Dear Mr. Pagenkopf:

Your annual report on FPC Form 301-A indicates no sales of natural gas were made during 1967 under your rate schedule(s) listed below.

If no further sales are contemplated under the subject rate schedule(s), it will be necessary for you to file an abandonment application and a notice of cancellation of rate schedule. To do this, you may complete and submit for each sale involved an original and three copies, under oath, of the enclosed FPC Form 277 (see Sections 157.30 (b) and 250.7 of the Commission's Regulations) and three copies of the enclosed FPC Form 281 (see Sections 154.97 (a) and 250.9 of the Commission's Regulations). A copy of excerpts from the Commission's Rules and Regulations, containing the sections referred to, is also enclosed for your information and guidance. Your filing should include three copies of any agreement entered into with the buyer to cancel the contract or if the contract has not been formally cancelled, three copies of a statement from the buyer indicating its position with respect to the proposed abandonment.

The above filings will not be required if you have assigned your interest in these properties to another party; however, in that event, it is requested that you furnish us with the name and address of the new owner and the date the assignment was made.

A prompt reply is requested.

Very truly yours,
/s/ Kenneth F. Plumb
Acting Secretary

FPC Gas Rate Schedule	Certificate Docket No.	Contract Date	Buyer
1	G-12694	4-29-53	United Gas Pipe Line Company

Enclosure No. 1383

BNG
Rand, M. L. :fjs/8-6-68

FEDERAL POWER COMMISSION
WASHINGTON 20426

BNG-IP/GC
Docket Nos. G-12692 and G-12694
H. A. Pagenkopf (Operator), et al.

Dec. 2, 1970

H. A. Pagenkopf, Trustee
1631 Milam Building
San Antonio, Texas 78205

Dear Mr. Pagenkopf:

Your annual report for 1969 on FPC Form 301-A indicates that the properties dedicated to a contract dated April 29, 1953 between Bee Quin and United Gas Pipe Line Company, presently designated as H. A. Pagenkopf (Operator), et al., FPC Gas Rate Schedule No. 1, have been sold. It is requested that you furnish the Commission with the name and address of the new owner and the date of the transfer of properties.

A prompt reply is requested.

Very truly yours,

Secretary

cc: United Gas Pipe Line Company
P. O. Box 1407
Shreveport, Louisiana 71102

FEDERAL POWER COMMISSION
WASHINGTON 20426

BNG-IP/GC
Docket No. G-12694
H. A. Pagenkopf
(Operator), et al.

January 13, 1971

Bay Rock Corporation
D-310 Petroleum Center
San Antonio, Texas 78209

Gentlemen:

This is with reference to the Commission's letter dated July 7, 1966, which requested that you file an application for a certificate of public convenience and necessity to continue the sale presently authorized in the captioned docket from properties covered by H.A. Pagenkopf (Operator), et al., FPC Gas Rate Schedule No. 1. These properties were sold to Louis Haring, et al., effective March 1, 1966. A copy of the letter is enclosed.

It is noted that you have not filed to continue the sale. If no sale is contemplated, it will be necessary for you to file an original and three copies of an application to abandon the service authorized in Docket No. G-12694. In order to accomplish this you may complete and submit an original and three copies of the enclosed FPC Form No. 277. It will also be necessary to submit three copies of a notice of cancellation of H. A. Pagenkopf (Operator), et al., FPC Gas Rate Schedule No. 1 by completing the enclosed FPC Form No. 281. Your submittal should also include three copies of: (1) the instrument whereby the properties were transferred from H. A. Pagenkopf to Louis Haring, et al.; (2) any agreement entered into with the buyer to cancel the contract or if the contract has not been cancelled, three copies of a statement from the buyer indicating its position with respect to the proposed abandonment.

A copy of excerpts from the Commission's Rules and Regulations is also enclosed to assist you in your filing.

A prompt reply is requested.

Very truly yours,

Enclosure No. 55400

Secretary